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(1) No. 92-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER HOLLOWAY, *et al.*,
Appellants,

v.

KEN HECHLER, *et al.*,
Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, Charleston

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JURISDICTIONAL STATEMENT

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January 11, 1993

HOFF

QUESTIONS PRESENTED

Can plaintiffs challenging a legislative redistricting plan overcome a *prima facie* presumption that systematic population disparities of nearly ten percent among districts are constitutional with evidence that such disparities were motivated by arbitrary and illegitimate polices, including regional and partisan bias, and the arbitrary manipulation of multimember districts, and where the legislature had the technical ability to reduce such variances?

Does *Davis* v. *Bandemer* provide a legitimate basis for dismissing claims of population-based malapportionment?

Does evidence of the arbitrary use of multimember districts solely for regional and partisan bias overcome the presumption that multimember districts are not unconstitutional *per se?*

Have the constitutional defects in West Virginia's legislative redistricting so tainted the state's legislative structure as to state a claim under article IV, § 4 of the Constitution of the United States, the Guarantee Clause?

THE PARTIES

Appellants, plaintiffs in the action below, are as follows: Peter Holloway, David Tyson, Chester L. Wollard, Marie Wollard, Mary Ann Osborne, T. David Higgins, Cary A. King and Opie Rollyson.

Appellees, defendants in the action below, are as follows: Ken Hechler, in his official capacity as Secretary of State of the State of West Virginia, Robert "Chuck" Chambers, in his official capacity as Speaker of the West Virginia House of Delegates, and Keith Burdette, in his official capacity as President of the West Virginia Senate.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The September 29, 1992 Memorandum Opinion and Judgment Order, which have not yet been officially reported, are set out in the accompanying Appendix at App. 1a and App. 32a, respectively.

A preliminary written order, entered February 26, 1992, the day of the hearing in this matter, is also unpublished, and is set out at App. 34a.

JURISDICTION

Appellants' complaint below sought preliminary and permanent injunctive relief against the enforcement of West Virginia's legislative redistricting statute, pursuant to 28 U.S.C. §§ 1343(3) & (4), 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. A three-judge court was convened pursuant to 28 U.S.C. § 2284(a). A hearing was held on February 26, 1992. The Memorandum Opinion and Judgment Order of the three-judge court, filed on September 29, 1992 granted a motion to dismiss the complaint with prejudice and denied any relief to appellants. A timely Notice of Appeal was filed on October 27, 1992.[1] Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under: (a) Section 1 of the fourteenth amendment of the Constitution of the United States which provides in pertinent part: "No state shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and (b) article IV section 4 of the Constitution of the United States, which provides, in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government...".

The text of House Bill 4043 (H.B. 4043) and Senate Bill 1 (S.B. 1) amend West Virginia Code (Code) § 1-2-2 and § 1-2-1, respectively. Copies of the legislation and maps

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[1] On December 11, 1992, upon application of counsel, the Chief Justice granted a thirty-day extension for the filing of this Jurisdictional Statement.

reflecting the districts embodied therein and appended to the complaint are appended hereto as Appendices E at 39a and F at 57a, respectively.

STATEMENT OF THE CASE

This constitutional challenge to West Virginia's legislative redistricting presents a unique fusion of issues, each bearing on the other: malapportionment of population among legislative districts; regional and partisan bias; and the arbitrary use of multimember districts. As a result, the weight of a citizen's for the West Virginia legislature has been made to depend on where he or she lives in the state.

Plaintiffs alleged that this *methodical and systematic* scheme egregiously violates the basic protections of the fourteenth amendment to the Constitution of the United States, as well as article IV, § 4 of the Constitution of the United States and 42 U.S.C. §§ 1983 and 1988.

Pursuant to the 1990 federal decennial census, the population of the State of West Virginia is 1,793,477 persons. The redistricting scheme for the West Virginia House of Delegates was originally enrolled as House Bill 301 ("H.B. 301") which was passed on December 9, 1991 and signed by the Governor on December 13, 1991 as amended and reenacted by House Bill 4043 ("H.B. 4043") on January 10, 1992, and signed by the Governor on January 13, 1992. This bill amends West Virginia Code § 1-2-2.

The redistricting scheme for the West Virginia Senate is embodied in Senate Bill 1 ("S.1") which was passed on December 9, 1991 and signed by the Governor on December 13, 1991. This bill amends the West Virginia Code § 1-2-1. There are 100 seats in the House of Delegates of the

Legislature of West Virginia. The ideal population for each individual seat is 17,935 persons. There are 34 seats in the West Virginia Senate. The ideal population for Senate districts is 52,749 persons.

Plaintiffs filed the complaint in this action on January 30, 1992. Pursuant to 28 U.S.C. § 2284, the Honorable Samuel J. Ervin, III, Chief Judge of the United States Court of Appeals for the Fourth Circuit, entered an order on February 12, 1992, designating Judge Kenneth K. Hall of the Circuit Court, and Chief Judge Charles H. Haden II and Judge Robert J. Staker, both District Judges in the Southern District of West Virginia, to preside as a three-judge court.

On February 21, 1992 the parties were notified that the court had scheduled an evidentiary hearing five days hence on February 26, 1992. There was no practicable opportunity for discovery. Plaintiffs' memorandum of law was filed the morning of the hearing. Pending at the hearing were plaintiffs' motion for injunctive and declaratory relief and defendants' motions to dismiss and for summary judgment.

At the hearing, in addition to numerous maps and official census data, plaintiffs offered the testimony of seven witnesses, including a demographic expert, a computer redistricting expert, and five West Virginia legislators. The demographic expert, John Morgan, testified to the demographic trends experienced in recent years in West Virginia, with emphasis on population gains and losses throughout the state. He also testified that the greatest population losses had occurred in the southern part of the state, while the greatest gains had occurred in the northern part of the state. He opined that these trends could reasonably be expected to continue. He further testified that districts in areas of population loss were underpopulated,

while districts experiencing population gains were overpopulated. Transcript of Proceedings, Feb. 26, 1992 at 20-58.

Plaintiffs also offered the testimony of Chris Larsin, an expert in computer-assisted redistricting. Contrary to the district court's characterization of Mr. Larsin's testimony, App. A at 6a, Mr. Larsin demonstrated that a single-member district plan with near zero population deviations could be drawn for the House of Delegates.[2]

The plaintiffs also offered the testimony of five members of the West Virginia House of Delegates,[3] including one Delegate, David McKinley, who is also Chairman of the West Virginia Republican State Executive Committee. Mr. McKinley testified that H.B. 4043: had a chilling effect on finding candidates to run for office throughout the state; unnecessarily disrupted county boundaries and other communities of interest; improperly allowed the election of more Delegates from southern West Virginia than from the

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[2] The court stated that Mr. Larsin's testimony "did not explain or comprehend how such could be accomplished." App. A at 6a. On the contrary, Mr. Larsin testified that he had started with a plan which had been prepared for the Select Committee on Redistricting, which created single-member districts, but left five counties "blank." Mr. Larsin testified that, given the time available, he used a computer program to draw twenty single-member districts for those five "blank" counties, with a population difference among them of two persons. Transcript of Proceedings, Feb. 26, 1992 at 61-67.

[3] The district court noted as "being more than passing strange that only five of the 26 Republican incumbents were called or saw fit to testify on plaintiff's behalf at the trial." App. A at 26a. Given the fact that plaintiffs had less than three working days from the announcement of the hearing date until the hearing, and that the legislature was in session during the time set for the hearing, plaintiffs maintain that the testimony of the five legislators, together with that of their demographic and redistricting experts, provided reasonable evidence of the intent and effects of the challenged redistricting scheme.

northern part of the state; failed to provide any legitimate justification for the population deviations involved; and was designed to protect incumbent members rather than communities of interest. Mr. McKinley also testified that, notwithstanding Republican electoral successes statewide and nationally, 1928 was the last time the House of Delegates was controlled by the Republicans, while 1930 was the last time Republicans controlled the Senate. He further testified that this was part of an ongoing trend, and that H.B. 4043 was likely to preclude further gains in the legislature. Transcript of Proceedings, Feb. 26, 1992 at 113-126.

Each of the other legislative witnesses testified to specific elements of the discriminatory intent or effect of H.B. 4043:

Delegate Charlotte Lane, a Delegate from the largest multimember district in the nation, testified that, because of voter registration patterns in that seven-member district, it was far more difficult for a Republican to get elected than would occur under a single-member district plan. She also testified that the district configurations in Kanawha County, the location of the seven-member district, were not motivated by any communities of interest, but to assure that most if not all the seven Delegates would be elected from a certain portion of the county. Transcript of Proceedings, Feb. 26, 1992 at 69-89.

Delegate Evelyn Richards testified that she was redistricted from her basic urban constituency to a rural constituency to ensure that she, a Republican, would be defeated because the Democratic Speaker of the House had been placed in her district, and that the legislature was aware of this effect when it passed the bill. She also testified as to procedural inadequacies in the passage of H.B. 4043. Transcript of Proceedings, Feb. 26, 1992 at 96-102.

Delegate Greg Martin testified that the plan unnecessarily crossed county boundaries, for the sole purpose of protecting Democratic incumbent legislators. Transcript of Proceedings, Feb. 26, 1992 at 102-113.

Finally, Delegate Robert Burke, Minority Leader of the House of Delegates, testified as to the effect of H.B. 4043 on Republican prospects for legislative committee assignments, and to the deleterious effect of the bill on Republican abilities to achieve any parliamentary success in the legislature. Transcript of Proceedings, Feb. 26, 1992 at 136-141.

Defendants offered testimony from two witnesses. David Ellis, employed by the Office of Legislative Services of the Legislature, who testified as to the technical capabilities of the legislative redistricting staff. He also testified that the reason for overpopulating the northern part of the state was because that was where the staff had begun drawing district lines. Transcript of Proceedings, Feb. 26, 1992 at 143-150.

Robert Chambers, Speaker of the West Virginia House of Delegates, also testified that the first districts drawn were in the northern part of the state. He further testified upon cross-examination that it was his understanding that as long as the population variances between districts was within five percent of ideal population [ten percent overall] it was acceptable. Transcript of Proceedings, Feb. 26, 1992 at 162-180.

At the end of the hearing, the court took the case under advisement. Later that day, the court entered an order denying plaintiffs injunctive relief, and dismissing the

complaint insofar as it averred the unconstitutionality of S.B. 1, the Senate redistricting bill. App. C at 36a.[4]

The court found that the 9.97 percent population disparity in the house of Delegates plan was not *prima facie* unconstitutional, and denied injunctive relief, allowing the 1992 Delegate elections to proceed under the challenged plan. *Id.* at 35a. However, the court declined to rule dispositively on the constitutionality of the population variances in the plan, and indicated that an opinion would be issued by the court at a later time. *Id.* at 36a.

On September 29, 1992 the court issued its Memorandum Opinion and Order, dismissing the complaint with prejudice. The court reiterated its earlier conclusion that a population deviation of less than ten percent was not unconstitutional *per se*, but then inexplicably relied on this Court's plurality ruling in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), and the interpretation of *Bandemer* by another three-judge district court in *Badham* v. *Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.* 488 U.S. 1024 (1988) to dispose of plaintiffs' malapportionment claim. App. A at 12a-15a.

The court disposed of plaintiffs' multimember-district claim using a similar analysis. *Id.* at 15a.

Plaintiffs claim of unconstitutional partisan gerrymandering was likewise dismissed "in light of the evidentiary prerequisites ... stated in *Badham*," with a determination that whatever gerrymandering that did exist was "*de minimus.*" *Id.* at 27a.

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[4] Given the short preparation time available, and the fact that only one member of the West Virginia Senate is a Republican, the plaintiffs' evidence admittedly focused primarily on the House of Delegates. For this reason, appellants are not pursuing an appeal of that February 26, 1992 order, insofar as it applies to S.B. 1.

Finally, the court found plaintiff's claim that H.B 4043 created a structural defect in West Virginia's state government in violation of article IV, § 4 of the Constitution of the United States to be non-justiciable.[5]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE DISTRICT COURT ERRED IN FAILING TO DETERMINE WHETHER THE WEST VIRGINIA LEGISLATURE MADE AN HONEST AND GOOD FAITH EFFORT TO CONSTRUCT LEGISLATIVE DISTRICTS AS NEARLY EQUAL IN POPULATION AS WAS PRACTICABLE

A. The District Court Erroneously Rejected Plaintiffs' Arguments That Legislative Population Deviations Below Ten Percent, While Not *Prima Facie* Unconstitutional, Must Be Supported By A Legitimate Rationale

The plaintiffs below argued that while the population disparities of the challenged districts may be *prima facie* constitutional, they are not constitutional *per se*. Plaintiffs maintained that such deviations are subject to challenge when they are motivated, not by legitimate or unavoidable considerations, but by regional and partisan bias.

Despite the availability of technology to create districts of equal population, the legislature failed to create districts as nearly equal in population as is practicable and failed to make an honest and good faith effort to do so. On the contrary, the legislature's goal was to allow population variances between districts of as much as five percent greater

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[5] The court also dismissed a claim brought under the first amendment, App. A at 27a-29a, but for reasons set out *infra*, this claim has not been pursued in this appeal.

or less than the ideal district size (a ten percent range) in each house of the legislature.

The 1982 redistricting scheme for the West Virginia House of Delegates divided the 100 seats among a combination of 40 single- and multimember districts. The challenged redistricting scheme divides the 100 seats of the House of Delegates into a combination of 56 single- and multimember districts. These districts range in size from one to seven members. The most overpopulated delegate district has a relative deviation of 4.97 percent greater than the ideal population, and an absolute deviation of 891 persons. The most underpopulated delegate district has a relative deviation of five percent less than the ideal population, and an absolute deviation of 896 persons. The relative deviation for the defendant's scheme is 9.97 percent and the absolute deviation is 1787 persons.

These high population deviations are the rule, not the exception in H.B. 4043. A majority of the delegate districts have population deviations closer to the ten percent range of deviation than to the constitutional requirement of equal population. The House of Delegates redistricting scheme embodied in H.B. 4043 includes: 41 seats which are in excess of four percent greater or less than the ideal population; 32 districts which are in excess of three percent greater or less than the ideal population; five seats which are in excess of two percent greater or less than the ideal population; and 13 seats which are in excess of one percent greater or less than the ideal population. Only nine of the 100 seats are within one percent of the ideal population. The average deviation is 3.46 percent.[6]

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[6] By comparison, the most overpopulated senate district has a relative deviation of 4.98 percent, and an absolute deviation of 2629 persons. The most underpopulated senate district has a relative deviation of minus five percent, and an absolute deviation of 2637 persons. As in the case of the

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court enunciated the fundamental requirement under the fourteenth amendment's equal protection clause "that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. The relevant inquiry in malapportionment cases is whether "the vote of any citizen is approximately equal in weight to that of any other citizen, *id.* at 579, the aim being to provide "fair and effective representation for all citizens." *Id.* at 565-566; *see also Board of Estimate of City of New York* v. *Morris*, 489 U.S. 688 (1989).

Reynolds held that "[since] the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes *because of place of residence* impairs basic constitutional rights under the fourteenth amendment just as much as invidious discriminations based upon factors such as race ..." *Reynolds*, *supra* at 565; *Davis* v. *Bandemer*, 478 U.S. 109, 123 (1986) (emphasis added).

House of Delegates plan, these high population deviations are typical in S. 1, with at least half the senate districts having population deviations closer to the ten percent range of deviation than to the constitutional requirement of equal population.

The senate redistricting scheme embodied in S. 1 includes 14 seats which are in excess of four percent greater or less than the ideal population; two seats which are in excess of three percent greater or less than the ideal population; two seats which are in excess of two percent greater or less than the ideal population; and 12 seats which are in excess of one percent greater or less than the ideal population. Only two of 34 seats are within one percent of the ideal population. The average deviation is 2.92 percent. The challenged senate scheme has a total relative deviation of 9.98 percent. Its range of absolute deviation is 5266 persons.

In *Reynolds*, this Court further explained that, "[full] and effective participation by all citizens in state government requires ... that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs and the Constitution demands, no less." *Reynolds, supra* at 565. An "equally effective voice" requires that population within electoral districts be "as equal as practicable." *Id.* at 577. The "basic principle of representative government remains, and must remain, unchanged -- *the weight of a citizen's vote cannot be made to depend on where he lives.*" *Id.* at 567 (emphasis added).

While "mathematical nicety" may not be a constitutional requisite, *id.* at 569, *Reynolds* nevertheless requires that "the overriding objective must be substantial equality among the various districts." *Id.* at 579.

Reynolds was subsequently interpreted by this Court in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973) and *White* v. *Regester*, 412 U.S. 755 (1973). The *Gaffney* Court determined that not every deviation from perfect population equality in state legislative districting establishes a prima *facie equal* protection violation.

White v. *Regester* sustained the distribution of Texas house seats in a plan, drawn by the state Legislative Redistricting Board, which had an overall range of 9.9 percent. This Court indicated in *White* that such a range of deviation did not make out a *prima facie* case of vote dilution under the fourteenth amendment, absent a showing by the plaintiffs that the deviation was not justified by a consistently applied and legitimate state policy.

While these decisions make clear that a population deviation of less than ten percent is not *prima facie*

unconstitutional, they do not preclude a successful challenge to West Virginia's legislative scheme. Following the guidelines set out in *Reynolds* and *White*, a number of courts have struck down legislative plans with deviations below 10 percent -- to as low as 2.5 percent -- where there was evidence that the legislature did not make a good faith effort to minimize population deviations, or where there was something suspect about the districts involved.[7]

In the challenged redistricting scheme, the legislature resorted to higher population deviations for reasons very similar to those in *White*. The population deviations among seats and districts embodied in H.B. 4043 are not the result of a consistently applied legitimate state policy; the deviations result from illegitimate considerations of incumbency protection, partisan gerrymandering and regional bias.

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[7] For example, in *Licht* v. *Quattrocchi*, 449 A. 2d 887 (R.I. 1982), the Rhode Island Supreme Court invalidated a state senate redistricting plan which reflected a deviation of 2.5 percent, finding that the Rhode Island legislature had improperly based its redistricting on a preset deviation standard. *See also, In re Legislative Districting of General Assembly*, 193 N.W. 2d 784, 789 (Iowa 1972).

Similarly, in *Farnum* v. *Burns*, 561 F. Supp. 83 (D. R.I. 1983), a federal district court invalidated a subsequent Rhode Island Senate plan with a deviation of 5.6 percent because proposed district lines "were drawn for speedy political purpose" of "preserving [the] Senatorial seats of incumbents favorable to the democratic leadership and punish[ing] incumbents critical of that leadership." *Id.* at 91.

Finally, a deviation of just over five percent was invalidated in *White* v. *Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) because the court concluded that the reasons for the deviation -- to bring a precinct into which a senator was considering moving his home into that senator's district, and to give a representative to the precinct in which he had gone to high school -- did not constitute substantial justification for otherwise unnecessary deviations. *See also Winter* v. *Docking*, 356 F. Supp. 88 (D. Kan. 1973) (invalidating a 12.4 percent deviation, where the prime reason for the deviation was to protect incumbents, and where county lines were arbitrarily ignored).

B. Rather than Reflecting a Good Faith Effort to Achieve Population Equality, the Challenged Scheme is Characterized by Regional Bias

The population deviations among seats and districts in the challenged plan disproportionately benefit certain regions of the state which, in effect, makes the weight of a citizen's vote dependent on where he lives.[8]

The population deviations allow incumbent legislators from certain regions to dominate key leadership positions in the West Virginia Legislature, particularly in the House of Delegates. Forty of the 51 underpopulated Delegate seats are in the southern region of the state. The population deviations in H.B. 4043 are biased in favor of southern West Virginia. The testimony of plaintiffs' witnesses suggested that H.B. 4043 was designed to dilute the voting strength of voters in other parts of the state, as well as Republicans or voters who tend to vote Republican, in order to protect incumbent Democratic legislators.

The plaintiffs alleged and offered testimony demonstrating this regional bias, but the district court declined to comment on it.

C. The Regional Bias Reflected in the Challenged Scheme Arbitrarily and Illegitimately Ignores Historical Demographic Trends in West Virginia

The population of the State of West Virginia decreased by 156,167 persons between the 1980 and 1990 federal decennial censuses. Ninety-seven thousand thirty

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[8] Delegate districts 14, 15, 16, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31 and 32 are located in southern West Virginia. Forty Delegate seats contained in these 14 districts are underpopulated by a total of 26,655 persons.

seven (97,037) of those persons -- or over three-fifths of the state's population loss -- came from counties in the southern region. Despite the southern region's disproportionate population loss, the legislature's intentional use of high population deviations, multimember districts and residency provisos in the legislature's plan for the southern region minimizes the loss of delegate seats that would be commensurate with the region's loss in population.

H.B. 4043 was purposefully designed to dilute and minimize the voting strength of voters residing outside of this 14-district southern region in order to protect sitting incumbents from the region. Many of the key leadership positions in the House of Delegates are held by members from this southern region of the state. [9]

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[9] For example: Speaker Robert Chambers, from Cabell County; Democratic Whip Rick Houvouras, from Cabell County; Finance Committee Chairman Richard Murensky, from McDowell County; Agriculture Committee Vice-Chairman Mary Pearl Compton, from Monroe County; Banking Committee Chairman Phyllis Rutledge, from Kanawha County; Banking Committee Vice-Chairman Stephen Williams, from Cabell County; Insurance Committee Chairman Tom Susman, from Raleigh County; Constitutional Revision Committee Chairman Bonnie Brown, from Kanawha County; Industry and Labor Committee Chairman Sharon Spencer, from Kanawha County; Government Operations Committee Vice-Chairman Ramona Cerra, from Kanawha County; Judiciary Committee Chairman James Rowe, from Greenbriar County; Political Subdivisions Committee Chairman Jack Roop, from Raleigh County; Roads and Transportation Committee Chairman James Reid, from Mingo County; the Vice-Chairman of the Judiciary Committee and Vice Chairman of the Redistricting Committee Rick Staton, from Wyoming County. WEST VIRGINIA BLUE BOOK 1989, pp. 312-380.

Six of the nine Democrats on the powerful Rules Committee (the Speaker is Chairman of the Committee) are from the 14 underpopulated southern districts. *Id.* The Majority Leader, Walter Rollins (Wayne County) is also from the southern region but is not from one of the 14 underpopulated districts.

Other key leadership positions in the House of Delegates are held by members from southern West Virginia who are not part of this 14-district

When viewed in this context, the motivation behind the challenged plan is analogous to that found impermissible in *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied,* 111 S.Ct. 681 (1981), where the incumbents' principal motivation was self-preservation. The only method available to achieve this end was dilution of minority voting strength. Even without a racial animus, the court concluded that a desire to preserve incumbency resulted in intentional discrimination.

The incumbent majority legislators in West Virginia engaged in exactly the same activity. Only the instrument of the vote dilution -- population variances and multimember districts, and the affected citizens -- are different.

Because of the Legislature's underpopulation of these southern districts in the challenged plan, it drew the remainder of the districts so that they are overpopulated by a similar amount. The result is a spread of 53,310 persons, the equivalent of almost three Delegate seats. This causes the southern region to have at least one-and-one-half additional Delegate seats than its population would entitle it. The redistricting scheme embodied in H.B. 4043 and S. 1 permits less than half of West Virginia's population to elect a majority of the seats in the House of Delegates and Senate, and conversely prohibits the majority of the state's population from electing its fair share of legislators. These results stand in stark contrast to the Supreme Court's observation in *Reynolds*, 377 U.S. at 565, that: "Logically, in a society ostensibly grounded on representative government, it would

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region, including: House Select Committee on Redistricting Chairman Charley Damron, from Mason County; Insurance Committee Vice Chairman Kenneth Adkins, from Wayne County; Health and Human Resources Committee Chairman Patricia White, from Putnam County; and Finance Committee Vice-Chairman Robert Kiss, from Raleigh County. *Id*

seem reasonable that a majority of the people of a State could elect a majority of that State's legislators."

D. The Challenged Scheme Predictably Provides for the Overrepresentation of Portions of the State Experiencing Population Losses, and for the Underrepresentation of Portions of the State Experiencing Increases in Population

The areas of the state that have experienced population growth in the past decade can be expected to continue to experience growth during the next decade. Plaintiffs' expert testified that areas that experienced population loss can be expected to experience continued population losses, and that this demographic trend will increase vote dilution for voters outside the southern region of West Virginia beyond its already disproportionate level. The district court chose to minimize this testimony. App. A at 6a.

Plaintiffs maintained that a principal purpose of the challenged redistricting scheme was to protect the incumbent members of the Legislature, and offered testimony to this effect as well. The method chosen to accomplish this illegitimate legislative goal was to intentionally overpopulate districts in those areas which had gained population.

A majority of the overpopulated districts are districts which can be expected to grow at a faster rate than the rest of the state in the 1990s. This future growth will exacerbate the discriminatory effect of the redistricting scheme. This growth is part of an approximately 30-year trend that can reasonably be expected to continue through the 1990s. Legislative districting plans adopted by the West Virginia Legislature have consistently overpopulated districts in these areas since this demographic trend began.

Plaintiffs contend that the appropriate analysis is whether the deviations in question occur in recognizing legitimate factors of state interest which are free from any signs of arbitrariness or discrimination. This analysis is particularly relevant to the facts of this case, and therefore the burden of proof should shift to the state to justify the deviations in the challenged plan, which are in excess of the 9.9 percent sustained in *White* v. *Regester, supra.*

The challenged plans are the result of arbitrary, intentional and invidious discrimination against certain overpopulated districts because of their geographic location and electoral preferences. Such discrimination cannot justify the population deviations in the challenged scheme.

E. The West Virginia Legislature Had and Continues to Have the Technical Ability to Construct Redistricting Plans Which Satisfy Constitutional Requirements

The quantum advance in computer technology for redistricting has totally obviated the necessity for population deviations of the sort in the challenged plan. As early as 1969, Justice Harlan commented in *Wells* v. *Rockefeller*, 394 U.S. 542 (1969) that "[a] computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." *Id.* at 551 (Harlan, J. dissenting).

Computer technology has dramatically changed the nature of the redistricting process. As Justice Stevens noted in *Karcher* v. *Daggett,* 462 U.S 725 (1983), 752 n. 10: "Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political characteristics of

each one in considerable detail." (Stevens, J., concurring). *See also id.* at 776 (White, J. dissenting).

Instead of constructing legislative districts with populations as nearly equal as practicable, the Legislature set as its population target and goal a deviation range of five percent above or bellow the ideal population (a 10 percent overall range of deviation).

By contrast, the Legislature enacted a congressional redistricting bill on October 11, 1991 (H.B. 221) which had a total population deviation of nine one-hundredths (0.09) of one percent among the three congressional districts. No county lines were split in achieving these population deviations. *See Stone* v. *Hechler*, 782 F. Supp. 1116 (N.D. W.V. 1992). It is clearly possible to draw legislative districts of nearly equal population.

II. THE DISTRICT COURT ERRONEOUSLY DISMISSED PLAINTIFFS' MALAPPORTIONMENT CLAIMS BY A MISPLACED RELIANCE ON *DAVIS* V. *BANDEMER*

Each of the elements cited by the plaintiffs -- rooted in regional and partisan bias -- taken together demonstrate a clearly illegitimate legislative intent which should have shifted the burden to the State and the legislature to justify the challenged deviations. The district court, instead, took the curious position of relying on the plurality in *Davis* v. *Bandemer*, 478 U.S. 109 (1986) to dismiss claims that had little or nothing to do with that case. App. A at 12a-15a.

In *Bandemer,* this Court concluded that claims of unconstitutional partisan gerrymandering are justiciable, and set out the requisite showing for successful gerrymandering claims. While plaintiffs' complaint below did include a

separate partisan gerrymandering claim, the district court relied on *Bandemer* to dismiss plaintiffs' malapportionment claim.

This Court did not address the issue of illegitimate intent in population malapportionment cases in *Bandemer* because it was not an issue in that case. It was the key issue in this case below, and the district court simply misapplied *Bandemer*. The district court compounded that error by its further reliance on *Badham* v. *Eu*, 694 F. Supp. 664, 669 (N.D. Cal. 1988), *aff'd mem.* 488 U.S. 1024 (1988), a case totally inapposite to this case. *Badham* involved a challenge to California's 1980s congressional redistricting scheme, principally on partisan gerrymandering grounds, with no claim based on population malapportionment. How that case can be dispositive of such a claim is not evident from the district court's reliance on it. App. A at 14a.

The court never confronted the overriding issue raised by the plaintiffs below: whether population variances among legislative districts that are below ten percent can be invalidated upon a showing of illegitimate legislative purpose. This clearly erroneous application of *Bandemer* and *Badham* merits this Court's plenary consideration.

III. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE ARBITRARY USE OF MULTI-MEMBER DISTRICTS IN THE CHALLENGED SCHEME

The district court below also misconstrued plaintiffs' challenge to the use of multimember districts in the legislative redistricting scheme, and misapplied relevant precedents. Citing *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the

court noted that "[multi-]member district have been held not to be unconstitutional *per se.*" App. A at 16a.

The plaintiffs had acknowledged this, just as they had acknowledged that population deviations below ten percent are *prima facie* constitutional. Nonetheless, plaintiffs maintained that it was the *arbitrary* use of multi-member districts, animated by regional and partisan bias, that tainted these districts.

The redistricting scheme for the House of Delegates embodied in H.B. 4043 apportions 100 Delegate seats among 23 multimember districts and 33 single-member districts. One of the multimember districts contains seven seats, one contains five seats, four contain four seats, five contain three seats and 12 contain two seats.[10]

While it is clear that the equal protection clause does not necessarily require the formation of single-member legislative districts, *Fortson* v. *Dorsey*, 379 U.S. 433, 436 (1965), this Court has recognized that multimember districting schemes may constitute invidious discrimination "if it can be shown that designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966).

In *White* v. *Regester*, 412 U.S. 755 (1973), the Court upheld a lower court's finding that certain multimember

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[10] The redistricting scheme for the Senate embodied in S. 1 apportions 34 Senate seats among 16 multimember districts containing two seats and one multimember district containing four seats.

legislative districts were in violation of the equal protection clause.

> Plainly, in our cases, multi-member districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. [Citations omitted.] But we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. [Citations omitted.]

Id. at 765-766. While this Court's focus in *White* was racial and ethnic discrimination, other opinions of the Court indicate that such challenges could be made in the political context as well. *See Burns, supra* at 88; *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971).

In *Davis* v. *Bandemer*, 478 U.S. 107 (1986), the Court reviewed its rulings regarding the use of multimember districts in the racial context and noted: "Although these cases involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts." *Id.* at 131 n. 12. The multimember scheme embodied in the challenged redistricting meets the standards set out by this Court. H.B. 4043 contains the largest multimember districts in the nation.

H.B. 4043 uses a mix of multimember districts and single-member districts to maximize Democratic political and electoral strength and to minimize Republican electoral and political strength. The multimember districting scheme also has the intended effect of discriminating against voters in certain regions of the state by virtue of their location in the state.

The Democratic leadership used multimember districts to maintain their power by fragmenting portions of adjacent counties which are sufficiently large to elect candidates of their choice in single-member districts. Portions of these counties are submerged in larger multimember districts to dilute, minimize or cancel out their voting strength.[11]

Plaintiffs maintained that the multimember scheme *as a whole*, when viewed in relation to the scheme's regional, partisan and numerical bias, dilutes the plaintiffs' votes. Plaintiffs also maintain that no legitimate state interest supports these multimember districts, and any proffered justifications are applied inconsistently and arbitrarily.

The district court's total failure to weigh plaintiffs' allegations and testimony regarding the arbitrary use of multimember districts was erroneous in light of this Court's language in *White*.[12]

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[11] For example, the population of Ohio County entitles it to approximately 2.8 Delegates. Neighboring Brooke County's population entitles it to approximately 1.5 Delegates. A portion of Brooke County is placed in Delegate district one leaving Brooke County with population for slightly more than one and one-third Delegates. A portion of Ohio County containing 266 persons is placed in Delegate district four leaving Ohio County with population for slightly more than two and two-thirds Delegates. Ohio County is divided again creating one two-Delegate district within Ohio County and one two-Delegate district dominated by Brooke County (one and one-third of a Delegate from Brooke County and two-thirds of a Delegate from Ohio County). This multimember scheme will be dominated by voters in Brooke County, effectively disenfranchising 12,955 persons in Ohio County.

[12] Ironically, the largest portion of the district court's opinion is devoted to the "proviso districts issue." App. A at 15a-21a. H.B. 4043 includes two clauses which provide that in two of these so-called "proviso districts," which are multi-member districts that encompass part of more than one county. The statute limits the number of persons who may be elected

IV. SUBSEQUENT ACTION BY THE FOURTH CIRCUIT DEMONSTRATES THAT THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD TO DISMISS PLAINTIFFS' PARTISAN GERRYMANDERING CLAIM

The plaintiffs argued and presented evidence of discriminatory partisan intent and effect primarily to demonstrate that the use of excessive population deviations and multimember districts was arbitrary and invidious, and served no legitimate state justification. However, the plaintiffs also maintained an independent claim of unconstitutional partisan gerrymandering, relying on this court's holding in *Bandemer, supra,* that such claims are justiciable.

The district court dismissed that claim, citing the "evidentiary prerequisites needed to be proved to establish unconstitutionality, as stated in *Badham* [v. *Eu, supra*]. App. A at 27a. Using *Badham* as its yardstick, the court found the gerrymandering in the enactment of H.B. 4043 to be "*de minimus.*" *Id.*

The district court below made a finding that:

> A Republican was elected as President of the United States in 1968, 1972, 1980 and

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from certain counties in those districts. App. A at 15a & n.8. The language of these two provisions is found at para. 20, App. E at 46a and para. 27, App. E at 48a.

Once again, plaintiffs conceded that such districts may not be unconstitutional *per se*, *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), *Dusch* v. *Davis*, 387 U.S. 112 (1967), but cited them as further evidence of an invidious scheme. The district court failed to consider the use of proviso districts in context with an already arbitrary and illegitimate multimember scheme.

> 1984, and in 1968, 1972 and 1984 a Republican was elected Governor of West Virginia. In the last sixty years the Republicans have never had control of the Senate or the House of Delegates in West Virginia.

App. A at 10a.

This finding is quite similar to one made by the three-judge court in *Badham*, which looked to Republican successes in winning statewide office -- even pointing to the fact that a Republican from California was President of the United States, "as evidence that Republicans were not shut out of "the political process as a whole," *Bandemer*, 478 U.S. at 132, thereby precluding a challenge to gerrymandered congressional districts. *Badham*, 694 F. Supp. at 672-673.

While the relevance of this finding to the district court's disposition of plaintiffs' gerrymandering claim is somewhat opaque, it is clear that the court did look to *Badham* for its "evidentiary prerequisites." App. A at 27a.

A recent ruling by the United States Court of Appeals for the Fourth Circuit suggests that the district court erred in blindly applying *Badham* to plaintiffs' claim. In *Republican Party of North Carolina* v. *Martin*, No. 91-1741 (4th Cir. Nov. 24, 1992) (LEXIS 30968), the Court of Appeals reversed, in part, the ruling of the district court dismissing plaintiffs' challenge to North Carolina's method of electing superior court judges.[13]

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[13] Copies of the court's slip opinion have been lodged with the Clerk of this Court.

The Court of Appeals for the Fourth Circuit has explicitly rejected such an analysis in *Martin:*

> We read the phrase "the political process as a whole," ... to speak to the alleged unconstitutional effects of the challenged electoral scheme on the relevant political sphere....Thus, we confine our analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina.

Martin, slip op. at 20-21 n. 24 (citations omitted).

The *Martin* court found it important that "Republican success in other elected positions in North Carolina affirms our conviction that [the Republican Party of North Carolina] has sufficiently alleged more than a *de minimus* effect on the political process of electing superior court judges." *Id.* at 22. The court further refused to read *Bandemer* to require that plaintiffs be excluded from the processes by which candidates are nominated and elected. To do so, said the court, would be "to adopt a construction of *Bandemer* that would render nugatory its holding that political groups may bring claims of partisan gerrymandering." *Id.* at 23.

The Fourth Circuit's ruling in this regard is binding on the district court, and plaintiffs argue that had it been decided in time for the hearing below in this case, there could have been a different outcome. At a minimum, this would call for a remand to the district court for reconsideration in light of this decision.[14]

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[14] The district court pointed to another recent district court case applying *Bandemer*: *Republican Party of Virginia* v. *Wilder*, 774 F. Supp. 400

V. THE DISTRICT COURT ERRONEOUSLY HELD CLAIMS UNDER THE GUARANTEE CLAUSE TO BE NONJUSTICIABLE WHERE A STRUCTURALLY DEFECTIVE REDISTRICTING SCHEME ALSO VIOLATES FOURTEENTH AMENDMENT GUARANTEES

Relying further on *Badham*, the district court concluded that plaintiffs claims under Article IV, section 4 of the Constitution of the United States -- the Guarantee Clause -"presents a nonjusticiable issue."[15] App. A at 29 a. Even

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(W.D. Va. 1991). App. A at 23a. In a ruling on a motion for preliminary injunction, the district court noted that at that stage of the litigation, the only apparent effects of the redistricting on Republicans was that four House members [had] decided to run for Senate seats, two House members [had] moved to open districts where they each will be the sole incumbent running, and two House members [had] chosen not to engage in nomination contests against fellow Republican House members." *Id.* at 403. The court concluded that plaintiffs had not demonstrated that they had sufficiently met the standard set out by *Bandemer*, and denied preliminary relief. It should be noted that the relief sought was the delay of the party nomination process which was scheduled for September 11, 1991, less than two months before the general election.

In *Wilder*, it was the rights of paired incumbent legislators that was the principal basis of the injunctive relief. *Cf. Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). *See also Thornburg* v. *Gingles*, 478 U.S. 30, 62, 68 (1986) (noting that it is the characteristics of the voters that is important, not the characteristics of the candidates; *Smith* v. *Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988) (ruling that legislators may be permissive intervenors in a vote dilution action, but are not necessary parties, even when the districts in question are ones they represent.)
Furthermore, the district court in *Wilder* relied heavily, as did the district court here, on *Badham*, an analysis brought into question by the Fourth Circuit's opinion in *Martin*.

[15] The court also dismissed plaintiffs claim under the first amendment under *Badham's* authority. App A at 27a-29a. A similar claim was dismissed by the Fourth Circuit in *Martin, supra*. Recognizing that it would be disingenuous to ask this Court to consider the Fourth Circuit's reasoning on partisan gerrymandering while ignoring its first amendment

assuming arguendo that the *Badham* court was correct in this holding, the two cases are readily distinguishable: *Badham* involved a challenge to congressional redistricting, not the structure of a state government. Plaintiffs in this case challenged a defective state governmental structure, the West Virginia House of Delegates.

Article IV, section 4 of the Constitution of the United States, the guarantee clause, provides that the United States shall guarantee to every state in the union a republican form of government. The district court, again citing *Badham*, determined that *Baker* v. *Carr*, 369 U.S. 186 (1962) mandates dismissal of this claim. App. A at 28a. Appellants maintain, however, that the clause has a contemporary role, authorizing judicial action where individual rights authorized in other provisions of the constitution are threatened by structural defects in state government.[16]

When a legislature becomes immutable to changing voting patterns -- and therefore no longer republican (in the most fundamental sense) -- that legislature has become structurally defective, while concurrently diluting the rights of individuals and the candidates they support.[17]

The district court argues that this Court disposed of claims under the guarantee clause as nonjusticiable in *Baker*. However, that approach was qualified in *Reynolds*, noting

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rationale, the appellants have chosen not to pursue an appeal on the first amendment claim.

[16] Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 682. *See also* R. Dixon, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 135 *et seq.* 265, 269 (1968).

[17] *See generally*, Rosenblom, *Justiciability and Justice: Elements of Restraint and Indifference*, 15 CATH. U.L. REV. 141 (1966); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966).

that *Baker* only held that "some questions raised under the Guarantee Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." *Reynolds* v. *Sims*, 377 U.S. at 582 (emphasis added). In fact, the *Baker* Court concluded that:

> the only significance that [*Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849)] could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government. The Court has since refused to resort to the Guaranty Clause -- which alone had been invoked for the purpose -- as the source of a constitutional standard for invalidating state action.

Baker, 369 U.S. at 222.

This suggests that the clause may have continued vitality in cases where, as here, plaintiffs allege violations not only of the guarantee clause, but also independent constitutional violations of the fourteenth amendment.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court to note probable jurisdiction, and to set this case for argument.

Respectfully submitted,

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January 11, 1993

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

PETER HOLLOWAY, DAVID TYSON, CHESTER L. WOLLARD, MARIE WOLLARD, MARY ANN OSBORNE, T. DAVID HIGGINS, CARY A. KING and OPIE ROLLYSON,

Plaintiffs,

v. CIVIL ACTION NO.2:92-0081

KEN HECHLER, Secretary of State of the State of West Virginia, ROBERT "CHUCK" CHAMBERS, Speaker of the West Virginia House of Delegates, and KEITH BURDETTE, President of the West Virginia Senate,

Defendants.

MEMORANDUM OPINION

In this action plaintiffs challenged the constitutionality of Senate Bill 1 (S.B. 1), and House Bill 4043 (H.B. 4043), which were respectively enacted by the Legislature of the State of West Virginia (Legislature) on December 3, 1991 and January 13, 1992, and reapportioned the electoral districts for the Senate and the House of Delegates (Delegate) seats of the Legislature, effective beginning with the elections to be had in the State in the year 1992.

This court has jurisdiction hereof pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), 1367 and 2284.[1]

An order was entered by the court notifying the parties that on February 26, 1992, the court would hear all evidence and arguments any of them desired to offer regarding all issues pending herein. All of the parties appeared by counsel thereat and the court there heard all of the evidence and arguments presented by them, following which, on February 26, 1992, the court entered its order in which, for the reasons therein set forth, the injunctive relief prayed for by the plaintiffs was denied and their complaint was dismissed insofar as it averred the unconstitutionality of S.B.1.

However, as stated in that order, the court then declined to rule upon the issue of the alleged unconstitutionality of H.B. 4043 pending the court's further consideration thereof, which remains as the only issue to be decided herein.

The reapportionment act enacted next before the enactment of H.B. 4043, was known as "The House of Delegates Apportionment Act of 1982" (1982 Act), and was codified as West Virginia Code (Code), § 1-2-2. H.B. 4043, also codified as Code, § 1-2-2, amended and reenacted the 1982 Act, pursuant to Article 6, section 7, of the Constitution of West Virginia, which requires the State's Delegate districts (hereinafter, "district(s)") to be reapportioned following each

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[1] Pursuant to 28 U.S.C. § 2284, the Honorable Samuel J. Ervin, III, Chief Judge of the Fourth Circuit Court of Appeals, entered an order herein on February 12, 1992, designating Judge Kenneth K. Hall, Judge of that court, and Chief Judge Charles H. Haden II and Judge Robert J. Staker, both District Judges in this district, to preside herein as a three-judge court.

decennial census of the United States. H.B. 4043 fixed at 100, as did the 1982 Act, the number of Delegates to be elected from the districts thereby apportioned among the State's 55 counties. Article 6, section 4, of that Constitution provides that members of the House of Delegates shall be elected every two years.

The Complaint

Plaintiffs allege that they are all citizens, residents and registered voters in West Virginia, one of them respectively being such in each of Ohio, Cabell and Berkeley, two others in Kanawha, and the remaining three in Wood, Counties in West Virginia.

It is not disputed that the named defendants are joined as such in their respective official capacities, as indicated in the above style of this action.

The thirty-one page complaint alleges five causes of action in which plaintiffs assert H.B. 4043 to be unconstitutional pursuant to different provisions of the Constitution of the United States.

The first three causes are interrelated and allege that H.B. 4043 is in violation of the rights guaranteed plaintiffs by the provisions of section I of the Fourteenth Amendment to the United States Constitution,[2] which plaintiffs claim require

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[2] Section I of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

that their votes, as well as those of all other citizens of the State, have an equal effect and worth in the electoral processes for the election of Delegates in future State elections. Those causes more specifically allege:

First Cause

This cause alleges, and defendants admit, that the most overpopulated Delegate district created by H.B. 4043 has a relative deviation of 4.97 per cent greater, and the most underpopulated one has a relative deviation of minus 5 per cent less, than the "ideal" populations of them, respectively.[3]

It further alleges that the districts in which plaintiffs are registered to vote, as created by H.B. 4043, were respectively designed by the Legislature to be either unconstitutionally overpopulated or underpopulated vis-a-vis the populations in them respectively and the populations in other districts created thereby, and in the State as a whole, which will cause votes cast by plaintiffs for the elections of Delegates to be diluted, and of unequal effectiveness and worth, as compared with those cast therefor by other voters in the State.

And it alleges that H.B. 4043 unconstitutionally creates two so-called "proviso" districts, both of which are advantageous to incumbent Delegates therein. The specifics of this allegation are more fully stated and discussed below.

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[3] The first cause further alleges that H.B. 4043 includes 41 seats which are in excess of four percent greater or less than the "ideal" population, 32 districts which are in excess of three percent greater or less than that ideal, five seats which are in excess of two percent greater or less than that ideal, and 13 seats which are in excess of one percent greater or less than that ideal, and that only nine of the 100 seats are within one percent of that ideal. The defendants deny this allegation.

Second Cause

This cause in substance incorporates the same allegations as those made in the first and third ones, but in addition thereto, it alleges that in enacting H.B. 4043, the Democratic leadership in the Legislature used multi-member districts to maintain their power by fragmenting portions of adjacent counties which were sufficiently large to elect candidates of their choice in single- member districts for the purpose of minimizing the voting strength in those districts.

Third Cause

Here plaintiffs allege that H.B. 4043 apportions 100 Delegate seats among 23 multi-member districts and 33 single-member districts for the purpose of maximizing Democratic, and minimizing Republican, political and electoral strength, which result would have been avoided had H.B. 4043 redistricted the State into 100 single-member districts, and that its enactment constitutes invidious, partisan gerrymandering to discriminate against Republican voters, including the plaintiffs, by diluting, minimizing and canceling out their voting and political strength and that of other Republican voters in given districts as well as in the State as a whole.

* * * * *

Except in the particulars above noted, the defendants' answers substantially deny the allegations in plaintiffs' causes.

The Evidence

Aside from maps and related documentary evidence showing the districts created by H.B. 4043, etc., plaintiffs'

evidence consisted of the testimony of seven witnesses, the substance of which was as follows:

John Morgan - a "political demographer":

The counties in the southern part of the state in which H.B. 4043 created districts containing population less than the "ideal" had lost, and those in the Eastern Panhandle thereof in which it created districts containing population exceeding the "ideal" had gained, population since the 1980 census. He opined, but conceded that he did so with no assurance, that such trend would continue during the 1990's and that should the 26 incumbent Republican Delegates now serving in the Legislature stand for election in 1992, one-third to one-fourth of them would be replaced by Democrats in consequence of the redistricting effected by H.B. 4043.

Chris Larsin - Director of Redistricting Analysis for the Republican National Committee:

The Legislature could have devised, in lieu of H.B. 4043, a redistricting plan which would have created 100 single-member districts with zero population variances; however, his testimony did not explain or comprehend how such could have been accomplished.

Charlotte Lane - a Republican and one of twelve Delegates elected at large in 1990 from Kanawha County, which then consisted of one, multi-member district:

During 1991-92, she served on the House Select Committee for Redistricting of the State's Delegate districts. The Chairman thereof favored reapportionment of the State into 100 single-member districts, but stated that he would permit the delegates serving from each district, as they were apportioned by the 1982 Act, to pretty much decide how their district would be reapportioned. Notwithstanding that all of

Kanawha County's twelve incumbent delegates had strongly favored the reapportionment's leaving Kanawha County as one, multi-member district, H.B. 4043 divided Kanawha County into three separate districts, including District 30, in which all of the incumbent Republican Delegates resided, but which also included the predominantly registered Democratic "Cabin Creek" area, as a result of which the political strength of those four incumbents, which had theretofore been county-wide, would be confined to District 30 only and would be diluted by the voters in the Cabin Creek area who traditionally voted straight democratic for the most part.[4]

Evelyn E. Richards - a Republican and one of six incumbent delegates elected at large in 1990 from the district created by the 1982 Act, which included all of Cabell and a small part of Wayne Counties:

For the most part, her constituency in 1990 consisted of voters in the urban portions of that district, but that H.B. 4043 had purposely drawn the lines of District 15 to include her residence therein, located at the extreme edge thereof, and to include more rural areas of a part of Cabell County, and

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[4] Under the 1982 Act, Kanawha County itself constituted one district which elected twelve delegates who ran at large.

In redistricting Kanawha County, H.B. 4043 created District 29, which includes a part of Kanawha, Greenbrier, Nicholas and Raleigh, and all of Fayette, Counties, and elects three delegates, and Districts 30, 31 and 32, each of which includes a part of Kanawha County only, and which respectively elect seven, one and four delegates.

That District 31 embraces a portion of the City of Charleston, in Kanawha County, in which blacks constitute about one-third of the population, and was created for the purpose of providing that black minority the opportunity more effectively to participate in the election of the one delegate to be elected from that district. Plaintiffs voice no objection to its creation.

like areas in five precincts in Lincoln County, all of which contain a predominance of registered democratic voters who traditionally vote straight democratic, and that "they [the Legislature] knew that when they did it."[5]

Greg Martin - a Republican incumbent elected at large in 1990, from a district which then included a part of Ohio County:

H.B. 4043 reapportioned Ohio County into districts, including the district in which he resides, from which one Delegate is to be elected, and included therein a part of

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[5] Under the 1982 Act, all of Cabell and a part of Wayne Counties constituted a district which elected six delegates who ran at large.

H.B. 4043, created District 15, which includes parts of Cabell and Lincoln Counties, and District 16, which includes parts of Cabell and Wayne Counties, each of which elects three delegates.

The defendant Chambers, called as a witness by the defendants, testified that he told the Cabell County delegation, which included Delegate Evelyn Richards, to present a plan for its reapportionment, all of them agreed to support a plan that had no more incumbents than there were seats to fill, such a plan was devised which divided Cabell County into two multi-member districts, each of which elected three delegates, and in each of which three incumbent delegates resided, after which Delegate Richardson informed him that she believed she could devise a better plan, and he told her to do so and submit it to the other Cabell County delegates for their consideration, and she chose not to do so. He further testified that H.B. 4043 placed the district in which he was required to run for reelection in 1992 in the same district as that in which Delegate Richards will be required to do so, and in so doing caused him to lose from his former constituency an area in which he had attended school, had many past associations and friends and had run quite well in past elections, and that the new district created by H.B. 4043 in which both he and Delegate Richards now live is much more likely to support a Republican candidate than it is a Democratic one. Other testimony of Mr. Chambers is summarized hereafter in the body of this opinion.

Brooke County, containing some 12,500 population, in which the voters traditionally vote for only Brooke County residents and straight democratic, which circumstance renders it all but impossible for a Republican residing in Ohio County, as does he, to be elected from that district, for which reason he did not file to run as a candidate for Delegate in 1992 therefrom. He conceded that the Delegate who moved in the House Select Committee on Redistricting in 1991-92, that H.B. 4043 establish a two-member district in Ohio County was Republican Delegate David McKinley.[6]

David McKinley - a Republican incumbent with twelve years' service as a Delegate, and who had served as Chairman of the Republican State Executive Committee for the last two years and was last elected in 1990 as a Delegate from a district created by the 1982 Act that included a part of Ohio County:

H.B. 4043 has had a chilling effect on finding Republican candidates to run for the office of Delegate, which was particularly true in respect to the district which includes the part of Ohio County in which Delegate Greg Martin resides.

He, Mr. McKinley, offered the amendment above referred to in order to combine what were proposed as

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[6] Under the 1982 Act, District 2, which elected two delegates, included parts of Ohio and Hancock, and all of Brooke, Counties, and District 3, which elected three delegates, included the remainder of Ohio, and a part of Marshall, Counties.

H.B. 4043, created District 2, which includes parts of each of Brooke and Ohio Counties, and elects two delegates; District 3, which includes a part of Ohio County, and elects two delegates; and District 4, which includes Marshall County and the remaining part of Ohio County and elects two delegates.

Districts 4 and 5 in Ohio County into a two-member district so that he and Gill White, another incumbent, could run together therein.

A Republican was elected as President of the United States in 1968, 1972, 1980 and 1984, and in 1968, 1972 and 1984 a Republican was elected Governor of West Virginia. In the last sixty years the Republicans have never had control of the Senate or the House of Delegates in West Virginia.

Since he did not reside in the two-member district in Ohio County created by H.B. 4043 that contained the constituency which had elected him in 1990, in order for him to file to run as a Delegate therein, while living outside thereof, he brought an action in mandamus in the Supreme Court of Appeals of West Virginia, which held that he could lawfully do so if he moved his residence thereto, notwithstanding that he was not yet a resident thereof.[7]

Robert Burk - Republican incumbent Delegate from Wood County and a member of the House Select Committee on Redistricting:

Before H.B. 4043 was enacted, Wood and Wirt Counties constituted a multi-member district in which five Delegates ran at large. H.B. 4043 divided that district into three new districts, two of which were single-member ones

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[7] *See Greg D. Martin, et al.* v. *Carole Jones, Circuit Clerk of Wood County, et al.* No. 20868 (W.Va. Supreme Court of Appeals filed January 29, 1992), in which the court held and said:

> In those cases in which a person moves to a new district, a part of which was his old district, after a legislative reapportionment occurring so close to election day that less than a year remains before the general election, the residency requirement of W.VA. CONST., Art. VI, § 12 has been met.

and the third a multi-member one which elected three delegates. One incumbent delegate resides in one, and two incumbent delegates reside in the other, of the two single-member districts, and two incumbents reside in the multi-member district. He filed as a candidate in 1992 in the multi-member district in which he does not now reside but to which he intends to move his residence.

* * * * *

At the close of the plaintiffs' evidence, the defendants moved that the complaint be dismissed and judgment entered in their favor. The court then took that motion under advisement.

* * * * *

The defendants presented two witnesses who testified, in substance, as follows:

David A. Ellis - a person with expertise in the use of computers, who was employed by the Office of Legislative Services of the Legislature since May, 1989, and was assigned to serve the Select Committee on Redistricting of the House of Delegates:

The Chairman thereof informed him early on that he favored that the reapportionment create single-member districts throughout the State, but directed him to work with other Delegates to develop plans they found to be favorable to them.

The initial redistricting plan submitted by him to the Committee comprehended the creation of 100 single-member districts, but to spur debate, different permutations of the area covered by all districts were prepared by the use of a computer and submitted to the Committee. In doing his work for the Committee, he was instructed not to use political data

for the purpose of devising any redistricting plan. All delegates serving in the Legislature were invited to come to his office and show him exactly where they lived so that they could be shown the district in which their residences would be located in any of the redistricting plans.

Robert C. Chambers - Speaker of the West Virginia House of Delegates and one of the defendants:

He did not advocate single-member districts throughout the State, because to do so made little sense to him; however, he believed that the Kanawha County district (a multi-member one which elected twelve delegates under the 1982 Act) and the Cabell County district (a multi-member one which included all of Cabell and a small part of Wayne Counties, and elected six delegates under the 1982 Act) constituted multi-member districts which were larger than they should be, and each should be divided into more than one district, but that he felt he could not recommend breaking Kanawha County into more than one district without making the same recommendation as to Cabell County.

* * * * *

Neither the plaintiffs, nor understandably the defendants, offered or presented in evidence any alternate redistricting plan or scheme that might be substituted in lieu of that created by H.B. 4043, or any facts, figures or data, geographical, demographical, or otherwise, from which any such alternate redistricting plan might be devised by the court should it find and hold H.B. 4043 to be unconstitutional.

Discussion and Conclusions of law as to the First, Second and Third causes: Malapportionment - Vote dilution issue

In *Conner* v. *Dalton*, 522 F.Supp. 350, 357-58 n.11 (E.D.Va. 1981), the court pointed out that:

> With respect to the lower end of the range of population variance, the Court has indicated that a deviation of less than 10% is prima facie constitutional. *White* v. *Regester*, 412 U.S. 755, 775, 93 S.Ct. 2332, 2344, 37 L.Ed.2d 314 (1973) (9.9%); *Gaffney* v. *Cummings*, 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1973) (7.83%).

Accordingly, defendants' admission as fact plaintiffs' allegation that the most overpopulated district created by H.B. 4043 has a relative deviation of 4.97 per cent greater, and the most underpopulated one a relative deviation of minus 5 per cent less, than the "ideal" population, may result in the votes cast in the election of delegates by any of the plaintiffs or some other voters in the State to have, at the most, a total of 9.97 per cent more, on the one hand, or less, on the other, effectiveness and worth, as compared with votes cast for or against them by still some other voters in the State, and thus result in the dilution of any of such votes cast to the extent of that 9.97 percentage figure, does not *prima facie* establish H.B. 4043 to be unconstitutional under the provisions of Section 1 of the Fourteenth Amendment.

The plurality in *Davis* v. *Bandemer*, 478 U.S. 109, 131-32, 106 S.Ct. 2797, 92 L.Ed.2d 85, 104-05 (1986), stated:

> In cases involving individual multi-member districts, we have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of

unconstitutional vote dilution. Only where there is evidence that excluded groups have "less opportunity to participate in the political processes and to elect candidates of their choice" have we refused to approve the use of multi-member districts. In these cases, we have also noted the lack of responsiveness by those elected to the concerns of the relevant groups. (Citations omitted).

These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representative of its choice does not render the scheme constitutionally infirm. This conviction, in turn stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election. Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under

the Equal Protection Clause. *See Mobile* v. *Bolden*, 446 U.S. at 111, n. 7, 64 L.Ed.2d 47, 100 S.Ct. 1490 (Marshall dissenting).

In *Badham* v. *March Fong Eu*, 694 F.Supp. 664, 669 (N.D.Cal. 1988), *aff'd*, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1988), the court stated that it followed "the plurality opinion [in *Bandemer*], because it provides the narrowest grounds for decision," and in so doing quoted from *Bandemer* the paragraph last quoted next above.

Multi-member districts issue

As to the vice, alleged in the third cause of the complaint, of H.B. 4043's having created some multi-member districts rather than 100 single-member ones, the court would point out that, as shown by the excerpts from the *Badham* decision quoted above, the Court there did not condemn the creation or existence of multi-member districts. Multi-member districts have been held not to be unconstitutional *per se*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), *Whitcomb* v. *Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).[8] *See also Simpkins* v. *Gressette*, 631 F.2d 287, 291 (4th Cir. 1980) ("[t]he authorities do not interdict multi-member districts.")

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[8] Moreover, there is Constitutional precedent for the existence of both single-member and multi-member districts in West Virginia. Article 6, sections 8 and 9, of the Constitution of the State of West Virginia, ratified in 1872, established the first delegate districts in the State, all to exist until the next census conducted under the authority of the United States, five of which were multi-member districts, two of them consisting of a single county, and the others consisting of two or more counties, and the remainder of them consisting of single-member districts.

Proviso districts issue

The first cause alleges that H.B. 4043 is unconstitutional because it creates two so-called "proviso" districts. There, plaintiffs point out that in elections conducted in multi-member districts, the candidates run at-large and are typically ranked according to the number of votes they respectively receive, and if there are four delegates to be elected in a given multi-member district, consisting of all or a part of more than one county, and that district is not a proviso district, then the four delegates who receive the highest number of votes in that district are elected; however, plaintiffs assert that if that same district is a proviso district, that is, if a statutory proviso applies thereto which provides that not more than three of those four delegates to be elected therefrom may reside in any given county therein, and four delegate candidates residing in one of the counties therein receive the highest number of votes, then the one of them who receives the fourth highest number of votes will not be elected; rather, in that circumstance, a candidate who resides in another county therein and who receives the fifth highest number of votes in that district will be elected, and plaintiffs claim that when such occurs, a majority of voters in that district are denied the right to elect the candidate of their choice, i.e., the candidate who received the fourth highest number of votes.[9]

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[9] The 1982 Act provided for eight proviso districts. The only two proviso districts created by H.B. 4043 are district 20, which elects four delegates and consists of parts of Logan, Lincoln and Boone Counties, and district 27, which elects five delegates and consists of parts of Raleigh and Summers Counties. H.B. 4043 provides, as to district 20 that no more than three, and as to district 27 that no more than four, delegates may be nominated, elected or appointed who are residents of any single county within those districts respectively. The remaining parts of Logan, Lincoln and Boone Counties, not included in proviso district 20, and of Raleigh and Summers Counties, not included in proviso district 27, are all included in other non-proviso districts.

No evidence whatever was presented by plaintiffs or any of the defendants bearing upon this "proviso" issue. It was only mentioned by counsel in oral argument at the trial hereof at which time plaintiffs' counsel were requested to present to the court any authority they could in support of their allegation that the two proviso districts in H.B. 4043 were unconstitutional, and they then had none, nor have they since presented any. Counsel for the defendants Chambers and Burdette likewise indicated that their research had failed to reveal any such authority.

Plaintiffs' claim that the proviso districts here are unconstitutional closely parallels the one made by the appellees in *Fortson* v. *Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), There, a Georgia statute apportioned the state's 54 senatorial seats among 54 senatorial districts drawn along existing county lines, with no mathematical disparity, and provided that where there was more than one district in a county, all of the county's senators would be elected by a county-wide vote. Thirty-three of those districts included from one to eight counties each, and the voters therein elected their senators by a district-wide vote. However, the remaining 21 of those districts were allotted in groups of from two to seven among the seven most populous counties, but voters in those 21 districts did not elect a senator by a district-wide vote, but rather joined with the voters of the other districts of the county in electing all of the county's senators by a county-wide vote.

The appellees, registered voters of Georgia, sued in the federal District Court seeking a decree that the requirement of county-wide voting in the seven multi-district counties violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge court granted

summary judgment in their favor, holding that the statute accorded different treatment to the voters in the 33 districts, as compared with those in the 21, in that those in the 33 were allowed to select their senators and those in the 21 were not, for which reason those in the 21 suffered invidious discrimination.

On direct appeal, the Supreme Court reversed the District Court, holding that it could not say that the county-wide voting in the seven multi-district counties resulted in denying their voters a vote approximately equal in weight to that of voters in the single-member constituencies, and that appellees' claim that the scheme was defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted, was only a highly hypothetical assertion that, in any event, ignored the practical realities of representation in a multi-district constituency, because:

> It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

Id., 379 U.S., at 438-39.

Almost exactly on point is the Court's decision in *Dusch* v. *Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967), which dealt with the constitutionality of what plaintiffs here refer to as a "proviso" district, although the Court did not so denominate it. There, a charter was approved by the Virginia legislature which consolidated the City of Virginia Beach, Virginia, with adjoining Princess Ann County, and established seven boroughs, one corresponding to the former boundaries of that City, and the other six corresponding to those of six magisterial districts. The council was composed of 11 members, four of whom were elected at large, without regard to residence, but the remaining seven were elected by the entire city, i.e., by all seven boroughs, but each one of those seven was required to reside in a different one of those boroughs.

Electors of five boroughs instituted suit in the federal District Court claiming that the consolidation plan, in its distribution of voting rights, violated the principle of *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964),[10] and asking for the convening of a three-judge court. A three-judge court was convened but held that it had no jurisdiction, since the issue was a local matter, and transferred the case to the District Court, which approved the charter's plan, called the "Seven-Four Plan" plan, for the election of councilmen. Upon appeal, the Fourth Circuit Court of Appeals reversed the District Court.

Upon appeal thereto, the Supreme Court reversed the Circuit Court of Appeals, and in so doing held that:

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[10] *Reynolds* v. *Sims* held that as a basic constitutional requirement, the Equal Protection Clause of the Fourteenth Amendment demanded no less than substantially equal representation for all citizens who vote in a state regardless of their place of residence therein.

> The Seven-Four Plan makes no distinction on the basis of race, creed or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson* v. *Dorsey*, 379 U.S. 433, 438, 13 L.Ed.2d 401, 404, 85 S.Ct. 498: [And here the court quoted from *Fortson* the same language as that hereinabove quoted therefrom].
>
> By analogy the present consolidation [Seven-Four] plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds* v *Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an "invidious" discrimination. 377 U.S. at 561, 12 L.Ed.2d at 527.

Id., 387 U.S., at 115.

In *Dallas County* v. *Reese,* 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), the appellees, residents of Selma, Alabama, sued challenging the system by which members of the Dallas County Commission were elected. That system, established by state statute, provided for county-wide balloting for each of the four county commissioners, but required that one of them be elected from each of four residency districts. Appellees constitutional claim was premised on the fact that the populations of the four districts varied widely, with the result that only one member of the City of Selma could be a member of the commission notwithstanding that the City contained about one-half of the county's population.

The District Court, relying on *Dusch* v. *Davis*, *supra,* entered summary judgment for the appellants, holding that since each county commissioner's tenure depended upon the vote of the qualified voters from the county-wide electorate, each such commissioner was required to represent the county and not just his own residential area. The Court of Appeals for the Fifth Circuit, sitting en banc, reversed, the majority concluding that the unequal residency districts diluted the votes of city residents, and that the resulting discrimination was invidious. The dissenters opined that *Dusch* controlled.

On appeal, the Supreme Court agreed with the dissenters and reversed, stating:

> *Dusch* reaffirmed the principle enunciated in *Fortson* v. *Dorsey*, 379 U.S. 433, 438, 13 L.Ed.2d 401, 85 S.Ct. 498 (1965), that when an official's "tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people of the county, and not merely those of people in his home district." Because the districts in

> the present plan are used "merely as the basis of residence for candidates, not for voting or representation," *ibid.*; *Dusch* v. *Davis*, 21 *supra*, at 115, 18 L. Ed. 2d 656, 87 S Ct 1554, each commissioner represents the citizens of the entire county and not merely those of the district in which he resides.

Id., 421 U.S. at 480.

The Court pointed out that when such a plan becomes effective, should a borough's resident on the council in fact represent only his borough, and not the county, then a different conclusion might follow, but added:

> We think it clear, however, that *Dusch* contemplated that a successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population.[11]

Id., 421 U.S. at 480.

This court perceives that the issue raised by plaintiffs' claim that the two proviso districts created by H.B. 4043 are unconstitutional, is in substance not essentially different from the issues raised by similar claims made in *Fortson*, *Dusch* and *Dallas County*, and that the Court's decisions in those cases are controlling authority on that issue. The court accordingly holds those two proviso districts created by H.B.

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[11] In each of *Fortson*, which involved the election of senators from multi-member county districts, and *Dusch*, which involved the election of borough councilmen, the Court had made this same point.

4043 are not unconstitutional under the provisions of the Equal Protection Clause of the Fourteenth Amendment and that H.B. 4043 is not rendered unconstitutional in virtue of its providing for those proviso districts.

Gerrymandering issue

The court pointed out in *Republican Party of Virginia* v. *Wilder*, 774 F.Supp. 400, 403-04 (W.D. Va. 1991):

> In *Davis* v. *Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed. 2d 85 (1986), the Supreme Court held that partisan gerrymandering cases are justiciable under the Equal Protection Clause of the Fourteenth Amendment. 478 U.S. at 143, 106 S.Ct. at 2816. While a majority agreed that such claims were justiciable, there was no majority opinion as to the test for determining whether an equal protection violation had occurred. Therefore, we follow the plurality opinion because it provides the narrowest grounds for decision. *Badham* v. *March Fong Eu*, 694 F.Supp. 664, 668-69 (N.D.Cal. 1988), *aff'd*, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1988), citing *Marks* v. *United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).
>
> To establish an Equal Protection violation in this, a partisan gerrymandering case, the Republicans [plaintiffs] must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127, 106 S.Ct. at 2808.

[W]e are of opinion that the Republicans have proved that the Virginia legislature intended to discriminate against Republicans when it adopted H.B. 3001. As stated in *Bandemer*, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129, 106 S.Ct. at 2809. However, even if the district boundaries were drawn *solely* for partisan ends, which has not been proven here [and this court finds and holds it not to have been proven by the plaintiffs in the case *sub judice*], that would not be, in and of itself, a violation of the Equal Protection Clause. 478 U.S. at 138-139, 106 S.Ct. at 2813.

To succeed on their claim, the Republicans [plaintiffs] must prove an actual discriminatory effect. 478 U.S. at 127, 106 S.Ct. at 2807. A *de minimus* effect is insufficient. 478 U.S. at 134, 106 S.Ct. at 2811. There must be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." 478 U.S. at 133, 106 S.Ct. at 2810. There must be proof that "the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." 478 U.S. at 134, 106 S.Ct. at 2811. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will

> consistently degrade a voter's or a group of voters' influence on the political process as a whole."

478 U.S. at 132, 106 S.Ct. 2810.

A map of the State of West Virginia having the districts created by H.B. 4043 superimposed thereon shows all of those districts to be compact in shape and to present no grotesquery in their configurations.

The evidence of both the plaintiffs and defendants establishes that most, if not all, of the delegates serving in the Legislature during the 1991-92 sessions thereof, when reapportionment legislation that culminated in the enactment of H.B. 4043 was being considered, strongly desired that the districts from which they would respectively stand for election, pursuant to the reapportionment legislation to be enacted, be drawn in such a manner as, in their opinions, would be the most politically advantageous to their re-election prospects, and they used their best efforts to achieve that result. The recognition of incumbency concerns is not unconstitutional *per se, White* v. *Weiser*, 412 U.S. 783, 791, 93 S.Ct. 2348, 2352, 37 L.Ed.2d 335 (1973), nor does the drawing of district boundaries so as to minimize the number of contests between present incumbents in and of itself establish invidiousness, *Burns* v. *Richardson,* 384 U.S. 73, 89, n. 16, 86 S.Ct. 1286, 1295 n. 16, 16 L.Ed.2d 376 (1966). However, neither can justify a population malapportionment of unconstitutional magnitude.

The evidence above summarized shows that the five incumbent Republican Delegates who testified as plaintiffs' witnesses herein were not entirely satisfied with H.B. 4043's reapportionment of the districts, created by the 1982 Act, from which they were elected. Given that the 1982 Act

provided for 27 multi-member districts and 13 single-member ones, a total of 40 districts, which H.B. 4043 reapportioned into 23 multi-member and 33 single-member districts, a total 56 districts, it is surprising that many more of the 100 incumbent delegates in the Legislature whose reelection prospects could have been adversely affected by the enactment of H.B. 4043 did not testify at the trial herein. If the gerrymandering alleged to have been effected by H.B. 4043 was as flagrant and widespread as plaintiffs' allegations would seem to indicate, it also strikes the court as being more than passing strange that only five of the 26 incumbent Republican incumbents were called or saw fit to testify on plaintiff's behalf at the trial hereof. None of the named plaintiffs testified.

In addition to the court's findings and holdings appearing hereinabove in respect to the plaintiffs First, Second and Third causes, the court further finds and holds in respect to those causes that neither the plaintiffs' evidence, nor for that matter that of the case as a whole, proved "intentional discrimination against an identifiable political group ... [or] an actual discriminatory effect on that group," nor constitute "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process," or prove either that "the challenged legislative plan [H.B. 4043] has had or will have effects that are sufficiently serious to require intervention by the federal courts in state [West Virginia's] reapportionment decisions," or that H.B. 4043 caused "the electoral process ... [to be] arranged in a manner that will consistently degrade a voters' or a group of voters' influence on the political process as a whole," or that it provides any group "less opportunity to participate in the political processes and to elect [delegate] candidates of their choice," or that it would operate to produce "a lack of responsiveness by those [delegates who may be elected

thereunder] to the concerns of ... [any] group," as this court evaluates that evidence in the light of those evidentiary prerequisites needed to be proved to establish unconstitutionality, as stated in *Badham*. Such gerrymandering, if any, that occurred in respect to the processes culminating in the enactment of H.B. 4043 was *de minimus*.

Fourth Cause

This cause alleges that H.B. 4043 violates the First Amendment of the Constitution of the United States[12] which protects the fundamental rights of freedom of speech and association, in that H.B. 4043 operates invidiously to discriminate against Republican voters solely because of their party affiliations, political beliefs and associations, by chilling public debate on issues of public importance, by burdening plaintiffs' rights to associate for political ends and to cast their votes effectively and by chilling the ability of Republicans to raise campaign funds in and thereby ameliorate and order to promote name overcome the statewide candidates recognition Democratic registration advantage in the State.

In *Badham* v. *March Fong Eu, supra*, the plaintiffs made the same claim as that made by the plaintiffs in this fourth cause. The court held that the plaintiffs there had failed to allege a violation of their First Amendment rights and

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[12] The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

dismissed their third cause in which that claim was made. In do doing, it said:

> It is well-settled that the "First Amendment protects political association as well as political expression." *Buckley* v. *Valeo,* 424 U.S. 1, 15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976). However, plaintiffs have failed to explain *how* A.B. 2X [the reapportionment statute in issue] penalizes the exercise of their First Amendment rights. Plaintiffs assert that A.B. 2X "negat[es] the effect of plaintiffs' votes and the votes of members of their party," but this claim ignores the fact that Republican votes were sufficiently effective to elect 18 Representatives.
>
> * * * * *
>
> Plaintiffs maintain that *Williams* [v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)] protects the "right of qualified voters, regardless of political persuasion, to cast their votes *effectively*," 393 U.S. at 30, 89 S.Ct. at 10 (emphasis added), and that their votes are rendered ineffective in those districts where there is a Democratic majority. We reject this contention. As the court stated in *Bandemer*: "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.... This is true even in safe districts where the losing group loses election after election." 106 S.Ct. at 2810.

> Although plaintiffs have generally alleged that Democratic incumbents need [not] attend to the views of fragmented and submerged Republican minorities in their districts," they pointedly do not allege that Democratic representatives have in fact "entirely ignore[d]" the interests of those voters.

Id., 694 F.Supp., at 675.

Finally, the argument that A.B. 2X "chills" meaningful debate on political issues is wholly without merit. The concept of a "chilling effect" is associated with the doctrine of overbreadth, and describes the situation where persons whose expression is protected are deterred from exercising their rights by the existence of an overly broad statute regulating speech. *See, e.g., New York* v. *Ferber,* 458 U.S. 747, 768, 772 & n.27, 102 S.Ct. 3348, 3360, 3362 & n.27, 73 L.Ed.2d 1113 (1982).... *Id.*, 694 F.Supp. at 675.

Plaintiffs here have also failed to allege, much less prove, a violation of their First Amendment Rights, for which reasons their fourth cause of action is dismissed.

Fifth Cause

Finally, plaintiffs allege that H.B. 4043 violates article IV, § 4 of the Constitution of the United States,[13] in that it creates and results in a defective electoral structure for legislative districts in the State by violating, in its operation, plaintiffs rights under the first and fourteenth amendments thereof.

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[13] Article IV, section 4 thereof provides, in part:

> The United States shall guarantee to every State in this Union a Republican Form of Government ....

Plaintiffs' claim in this fifth cause must also be dismissed. The plaintiffs in *Badham* also made the same claim, and the court there disposed of that claim by stating:

> This contention is easily dismissed on the authority of *Baker* v. *Carr,* 369 U.S. 186, 223-24, 82 S.Ct. 691, 713-14, 7 L.Ed.2d 663 (1962), and the cases cited therein. In *Baker,* the Court noted that it has "consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." Id. at 224, 82 S.Ct. at 714. With respect to the reapportionment challenge before it, the Court specifically stated that "any reliance on [the guaranty] clause would be futile." Id. at 227, 82 S.Ct. at 715. This result is not altered by *Bandemer's* holding that an equal protection challenge to a partisan gerrymander is justiciable; *Baker* specifically distinguished the equal protection claim before the Court from the non-justiciable claims based on the Guaranty Clause.

Id., 694 F.Supp., at 675-76.

For the foregoing reasons, plaintiffs' fifth cause of action presents a non-justiciable issue and is therefore dismissed.

Accordingly, the defendants' motion that the plaintiffs' complaint be dismissed and judgment entered in favor of the defendants is GRANTED.

An appropriate order will be entered, contemporaneously with the filing of this Memorandum Opinion in the office of the Clerk of this court, ordering

dismissal of the plaintiffs' complaint with prejudice and granting judgment herein in favor of the defendants.

The Clerk of this court is directed forthwith upon the filing of this Memorandum Opinion in his office to mail an attested copy hereof to all counsel of record herein.

Dated: September 29, 1992

_____

Kenneth K. Hall, Judge of the
United States Circuit Court of Appeal

_____

Charles H. Haden II,
United States Chief Judge,
Southern District of West Virginia

_____

Robert J. Staker,
United States District Judge,Southern District of
West Virginia

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

PETER HOLLOWAY, DAVID TYSON,
CHESTER L. WOLLARD, MARIE WOLLARD,
MARY ANN OSBORNE,T. DAVIS HIGGINS,
CARY A. KING and OPIE ROLLYSON,

Plaintiffs,

v. CIVIL ACTION NO. 2:92-0081

KEN HECHLER, Secretary of State of the State of West Virginia, ROBERT "CHUCK" CHAMBERS, Speaker of the West Virginia House of Delegates, and KEITH BURDETTE, President of the West Virginia Senate,

Defendants.

JUDGMENT ORDER

For the reasons set forth in this court's Memorandum Opinion in this action, dated September 29, 1992 and filed in the office of the Clerk of this court contemporaneously with the entry of this Judgment Order therein, it is hereby ORDERED that the defendants' motion that plaintiffs' complaint be dismissed and that judgment be entered in the defendants' favor be, and the same is, hereby SUSTAINED.

It is further ORDERED that plaintiffs' complaint herein be, and the same is, DISMISSED with prejudice, and that judgment be, and it hereby is, GRANTED in favor of the defendants and against the plaintiffs.

The Clerk of this court is directed forthwith to mail an attested copy of the court's Memorandum Opinion and of this Order to all counsel of record herein.

_____

Kenneth K. Hall, Judge of the
United States Circuit Court of Appeal

_____

Charles H. Haden II,
United States Chief Judge,
Southern District of West Virginia

_____

Robert J. Staker,
United States District Judge,Southern District of
West Virginia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

PETER HOLLOWAY, DAVID TYSON, CHESTER L. WOLLARD, MARIE WOLLARD, MARY ANN OSBORNE, T. DAVID HIGGINS, CARY A. KING and OPIE ROLLYSON,

Plaintiffs,

v. CIVIL ACTION NO.2:92-0081

KEN HECHLER, Secretary of State of the State of West Virginia, ROBERT "CHUCK" CHAMBERS, Speaker of the West Virginia House of Delegates, and KEITH BURDETTE, President of the West Virginia Senate,

Defendants.

ORDER

On this 26th day of February, 1992, an evidentiary hearing was had before the court upon all matters in issue among the parties to this action, at which all of the parties appeared by their representative counsel.

The court finds that in Paragraph 28 of the Complaint, the plaintiffs allege, and in their answers the defendants have admitted, that the most overpopulated House of Delegates district under the redistricting plan embodied in House Bill 4043 in issue herein, has a relative disparity of 4.97% greater

than the "ideal" population, and the most underpopulated House of Delegates District embodied therein has a relative disparity of 5% less than the "ideal" population. That disparity does not exceed 10%, which fact is not denied by any of the parties, and thus the House Bill 4043 is not prima facia unconstitutional. *Davis* v. *Bandemer*, 478 U.S. 109 (1986).

Moreover, the parties have stipulated that the contents of the affidavit of Mary Ratliff, Deputy Secretary of State of the State of West Virginia demonstrates that the elections of House of Delegates members scheduled by statute pursuant to House Bill 4043 are imminent and that serious logistical and other problems to the Office of Secretary of State of West Virginia would be encountered should injunctive relief be awarded herein pursuant to the plaintiff' prayer therefore. In addition thereto the electoral processes for the election not only members of the House of Delegates under House Bill 4043, but also of the election of all other candidates seeking other offices in those elections, and thus the public interest, would be adversely affected should injunctive relief be awarded herein. Also no evidence has been presented to show that irreparable injury would result to any party herein should injunctive relief be denied. Moreover, while the redistricting plan comprehended by House Bill 4043 is not prima facia unconstitutional, as above pointed out," "[i]nterim relief using an unconstitutional apportionment plan is permissible, when . . . necessary election machinery is already in progress for an election rapidly approaching. *Cosner* v. *Dalton*, 522 F.Supp 350, 364 (E.D.Va. 1981), citing *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

For the foregoing reasons, it is under the court that the injunctive relief prayed for in the complaint be, and it hereby is, DENIED.

The court further points out that no evidence whatsoever was introduced on this date bearing upon or tending to prove any unconstitutionality in respect to the plan for the redistricting of the Senatorial districts, as embodied in Senate Bill 1, based upon which motion having been made at the close of all of the evidence that plaintiffs' complaint be dismissed insofar as it seeks redistricting of the Senatorial Districts, as embodied in Senate Bill 1, and the court concluding and finding that motion to be well taken, the same is hereby SUSTAINED. Accordingly, the plaintiffs' complaint is hereby DISMISSED insofar as it avers the unconstitutionality of Senate Bill 1.

While some disparity in the redistricting of House of Delegates districts exists in House Bill 4043, that disparity does not equal as much as ten percent (10%) and House Bill is thus prima facia constitutional, the court nevertheless declines now dispositively to rule upon the issue of the constitutionality thereof raised by the complaint and the answers of the parties pending further consideration of those issues, and the principles of law applicable thereto and any curative measures that lawfully must be pursued to correct any unconstitutionality the court may find therein. Accordingly, an opinion will be issued by the court at a further date concerning that issue.

The Clerk of this Court is hereby directed forthwith to contact all counsel of record herein by telephone and disclose to them respectively the contents of this Order and forthwith thereafter to mail all of them a copy hereof by United States mail.

ENTERED at the direction of Judge Hall with the concurrences of Judge Haden and Judge Staker.

Ronald D. Lawson, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

PETER HOLLOWAY, DAVID TYSON,
CHESTER L. WOOLLARD, MARIE WOOLLARD,
MARY ANN OSBOURNE, T. DAVID HIGGINS,
GARY A. KING and OPIE ROLLYSON,

Plaintiffs,

vs. CIVIL ACTION
NO. 2:92-0081

KEN HECHLER, Secretary of State of the State of West Virginia, ROBERT C. CHAMBERS, Speaker of the West Virginia House of Delegates, and KEITH BURDETTE, President of the West Virginia Senate,

Defendants.

NOTICE OF APPEAL

NOTICE is hereby given that the Plaintiffs appeal to United States Supreme Court from the Memorandum Opinion and Judgment Order entered on the 29th day of September, 1992, by the Three-Judge District Court convened pursuant to 28 U.S.C. § 2284 to hear the above-styled cause.
Dated this the 27th day of October, 1992.

CHARNOCK AND CHARNOCK
Jane Charnock
179 Summers Street
523 Peoples Building
P.O. Box 207
Charleston, West Virginia 25321

CERTIFICATE OF SERVICE

I, Jane Charnock, do hereby certify that on the 28th day of October, 1992, that a true and accurate copy of the foregoing has been mailed with sufficient postage thereon to:

Michael J. Basile, Esquire
Counsel for Ken Hechler
Room E-26
State Capitol Building
Charleston, West Virginia 25305

M.E. Mowery, Esquire
Counsel for Keith Burdette
Counsel for Robert C. Chambers
Room M-422
State Capitol Building
Charleston, West Virginia 25305

APPENDIX E

ENROLLED
H. B. 4043

(By Mr. Speaker, Mr. Chambers, and Delegate Damron)

[Passed January 10, 1992; in effect from passage]

AN ACT to amend and reenact section two. article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to apportionment of membership of the House of Delegates; making technical corrections to delegate districts to reflect the intent of the Legislature in its original reenactment of this section in one thousand nine hundred ninety-one.

Be it enacted by the Legislature of West Virginia:

That section two. article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 2. APPORTIONMENT OF REPRESENTATION

§1-2-2. Apportionment of membership of House of Delegates.

(a) This section shall be known and may be cited as "The House of Delegates Apportionment Act of 1991."

(b) As used in this section:

(1) "County" means the territory comprising a county of this state as it existed on the first day of January, one thousand

nine hundred eighty, notwithstanding any boundary changes made subsequent thereto;

(2)"Block," "block group," "census tract," "place" and "voting district" mean those geographic areas as defined by the bureau of the census of the United States department of commerce for the taking of the one thousand nine hundred ninety census of population and described on census maps prepared by the bureau of the census. Such maps are, at the time of this enactment maintained by the bureau of the census and filed in the office of legislative services;

(3) "Magisterial district" means the territory comprising a magisterial district of this state as reported to and used by the bureau of the census of the United States department of commerce for the taking of the one thousand nine hundred ninety census of population and described on census maps prepared by the bureau of the census;

(c) The House of Delegates shall be composed of one hundred members elected from the delegate districts hereinafter described:

(1) The county of Hancock and Block 101, Block 102, Block 103, Block 104, Block 105, Block 106, Block 107, Block 108, Block 110, Block 111, Block 125, Block 126, Block 131 and Block 132 of Block Group 1 in Census Tract 0301 contained in voting district EP 26, Block 101, Block 102, Block 103, Block 104, Block 105, Block 106, Block 107, Block 108, Block 111, Block 114 and Block 115 of Block Group 1 in Census Tract 0302 contained in voting district EP 26, Block 202, Block 203, Block 204, Block 205 and Block 206 of Block Group 2 in Census Tract 0302 contained in voting district EP 26, and Block 109, Block 112, Block 113, Block 114, Block 115, Block 119, Block 120, Block 121, Block 122 and Block 130 of Block Group 1 in Census Tract

0301 contained in voting district EP 34B of the Weirton magisterial district in the county of Brooke shall constitute the first delegate district and shall elect two delegates;

(2) That portion of Brooke county not included in the first delegate district, voting district EP 12, voting district EP 13, voting district EP 142, voting district EP 146, voting district EP 147, voting district EP 158, voting district EP 159, voting district EP 160, voting district EP 161, and Block 101A, Block 101B, Block 101C, Block 102, Block 103, Block 104, Block 105A, Block 105B, Block 106A, Block 106B, Block 107, Block 108A, Block 108B, Block 109A, Block 109B, Block 110A, Block 110B, Block 111A, Block 111B, Block 112, Block 113A, Block 113B, Block 114, Block 115A, Block 115B and Block 118 of Block Group 1 in Census Tract 0020 contained in voting district EP 14, and Block 315A, Block 315C, Block 316A and Block 316C of Block Group 3 in Census Tract 0020 contained in voting district EP 14 of the District One magisterial district of Ohio county and voting district EP 134, voting district EP 135, voting district EP 138, voting district EP 141, Block 319, Block 320, Block 321, Block 322 and Block 335 of Block Group 3 in Census Tract 0018 contained in voting district EP 137, and Block 413, Block 424, Block 428, Block 429, Block 430, Block 431, Block 432 and Block 433 of Block Group 4 in Census Tract 0018 contained in voting district EP 137, and Block 504A of Block Group 5 in Census Tract 0018 contained in voting district EP 137, and Block 601A, Block 602A, Block 603A, Block 607A, Block 610, Block 611, Block 612 and Block 613 of Block Group 6 in Census Tract 0018 contained in voting district EP 137, and Block 701A of Block Group 7 in Census Tract 0018 contained in voting district EP 137 of the District Three magisterial district of Ohio county shall constitute the second delegate district and shall elect two delegates;

(3) That portion of Ohio county not included in the second delegate district, except Block 206, Block 216, Block 217, Block 218, Block 220, Block 221, Block 222 and Block 299 of Block Group 2 in Census Tract 0025 contained in voting district EP 100 of magisterial District Three of Ohio county shall constitute the third delegate district and shall elect two delegates;

(4) The county of Marshall and Block 206, Block 216, Block 217, Block 218, Block 220, Block 221, Block 222 and Block 299 of Block Group 2 in Census Tract 0025 contained in voting district EP 100 of magisterial District Three of Ohio county shall constitute the fourth delegate district and shall elect two delegates;

(5) The county of Wetzel except for voting district EP 37 and voting district EP 38 of magisterial District Two shall constitute the fifth delegate district and shall elect one delegate;

(6) The counties of Doddridge and Tyler and voting district EP 37 and voting district EP 38 of magisterial District Two of Wetzel county shall constitute the sixth delegate district and shall elect one delegate;

(7) The counties of Pleasants and Ritchie and voting district EP 27 and voting district EP 31 of the DeKalb-Troy magisterial district of Gilmer county shall constitute the seventh delegate district and shall elect one delegate;

(8) All of the Union magisterial district, all of the Walker magisterial district, voting district EP 56A, that portion of voting district EP 56 and voting district EP 58 of the Clay magisterial district, voting district EP 40 and voting district EP 36C of the Parkersburg magisterial district, and Block 101A, Block 102, Block 103, Block 104, Block 106B, Block

107, Block 108, Block 109, Block 110, Block 111, Block 112, Block 113, Block 114, Block 115, Block 116, Block 117, Block 118, Block 119A of Block Group 1 in Census Tract 0104 contained in voting district EP 46, voting district EP 47, voting district EP 48, voting district EP 49, voting district EP 49A, voting district EP 50, voting district EP 51, voting district EP 51A and voting district EP 52 of the Williams magisterial district of Wood county shall constitute the eighth delegate district and shall elect one delegate;

(9) The county of Wirt and all of the Steele magisterial district, all of the Slate magisterial district, that portion of voting district EP 81 in the Tygart magisterial district, that portion of voting district EP 81 and voting district EP 82 of the Harris magisterial district, voting district EP 57 and voting district EP 57A of the Clay magisterial district, and voting district EP 27, voting district EP 37A, voting district EP 37C, voting district EP 37D and voting district EP 38 of the Parkersburg magisterial district of Wood county shall constitute the ninth delegate district and shall elect one delegate;

(10) That portion of Wood county not included in the eighth or ninth delegate district shall constitute the tenth delegate district and shall elect three delegates;

(11) The county of Roane and voting district EP 23 of the Ripley magisterial district and all of the Washington magisterial district of Jackson county shall constitute the eleventh delegate district and shall elect one delegate;

(12) All of the Grant magisterial district of Jackson county, and that portion of voting district EP 5, voting district EP 6, voting district EP 10, voting district EP 11 voting district EP 12 and the place of the city of Ravenswood in the Ravenswood magisterial district of Jackson county, and

voting district EP 21, voting district EP 22. voting district EP 24, voting district EP 25, voting district EP 26, voting district EP 28, voting district EP 29, voting district EP 33 and the place of the city of Ripley in the Ripley magisterial district of Jackson county shall constitute the twelfth delegate district and shall elect one delegate;

(13) All of the Union magisterial district and voting district EP 13 and voting district EP 14 of the Ravenswood magisterial district of Jackson county. and all of the Cologne magisterial district, all of the Copper magisterial district. all of the Graham magisterial district. all of the Union magisterial district, all of the Waggener magisterial district and voting district EP 1, voting district EP 10 and voting district EP 12 of the Robinson magisterial district of Mason county, and all of the Buffalo-Union magisterial district, all of the Pocatalico magisterial district, and voting district EP 27 voting district EP 28 of the Scott magisterial district and that portion of voting district EP 28 in the Teays magisterial district of Putnam county shall constitute the thirteenth delegate district and shall elect two delegates:

(14) That portion of Mason county not in the thirteenth delegate district and that portion of Putnam county not in the thirteenth delegate district shall constitute the fourteenth delegate district and shall elect two delegates:

(15) That portion of voting district EP 29. voting district EP 46 that portion of voting district EP 47 and voting district EP 48 of the District One magisterial district, voting district EP 13, that portion of voting district EP 19, voting district EP 26, voting district EP 27, voting district EP 28, that portion of voting district EP 29, voting district EP 30, voting district EP 31, voting district EP 32, voting district EP 33, voting district EP 34, voting district E P 38, voting district EP 39, that portion of voting district EP 40, that portion of voting district

EP 42, voting district E P 43 and voting district EP 45 of the District Two magisterial district, voting district EP 14, voting district EP 15, voting district EP 16, voting district EP 17, voting district EP 18, that portion of voting district EP 19, voting district EP 20, voting district EP 21, voting district EP 22, voting district EP 23, that portion of voting district EP 24 that portion of voting district EP 40, voting district EP 41 and that portion of voting district EP 42 of the District Three magisterial district, that portion of voting district EP 24, that portion of voting district EP 47, that portion of Census Tract 0103, Block 199F of Block Group 1 in Census Tract 0104, Block 405A, Block 410, Block 411, Block 412, Block 414C, Block 417, Block 499B, Block 499H and Block 499K of Block Group 4 in Census Tract 0104, and Block 502A, Block 502B and Block 503A of Block Group 5 in Census Tract 0104 of the District Four magisterial district, and that portion of Census Tract 0103, that portion of Census Tract 0104, Block 401 and Block 402 of Block Group 4 in Census Tract 0105, Block Group 1, Block Group 2, Block Group 3, Block 401 and Block 411 of Block Group 4, and Block 501, Block 511, Block 512, Block 513, Block 514, Block 522, Block 523, Block 531 and Block 532 of Block Group 5 in Census Tract 0106, Block 116, Block 117, Block 118 Block 119, Block 120, Block 121, Block 132, Block 133A and Block 133B of Block Group 1, Block Group 2, Block Group 3, Block Group 4 and Block Group 5 in Census Tract 0107, and Census Tract 0108 of the District Five magisterial district of Cabell county and all of the Carroll magisterial district of Lincoln county shall constitute the fifteenth delegate district and shall elect three delegates;

(16) That portion of Cabell county not included in the fifteenth delegate district and voting district EP 59, voting district EP 60, voting district EP 61 and voting district EP 63 of the Westmoreland magisterial district and that portion of voting district EP 59 in the Ceredo magisterial district of

Wayne county shall constitute the sixteenth delegate district and shall elect three delegates;

(17) All of the Union magisterial district except voting district EP 54 of Wayne county, and voting district EP 26, voting district EP 30, voting district EP 36, voting district EP 37, voting district EP 41, voting district EP 42 and voting district EP 45 of the Stonewall magisterial district of Wayne county, and voting district EP 56, voting district EP 57, voting district EP 58, voting district EP 62, that portion of voting district EP 14, and that portion of voting district EP 19 of the Westmoreland magisterial district of Wayne county, and voting district EP 22 of the Butler magisterial district of Wayne county shall constitute the seventeenth delegate district and shall elect one delegate;

(18) That portion of Wayne county not in the sixteenth or seventeenth delegate district shall constitute the eighteenth delegate district and shall elect one delegate;

(19) The county of Mingo and voting district EP 43 of the West magisterial district of Logan county shall constitute the nineteenth delegate district and shall elect two delegates;

(20) All of the county of Logan except voting district EP 43 of the West magisterial district and all of the county of Lincoln except the Carroll magisterial district and voting district EP 1, that portion of voting district EP 2, voting district EP 3, voting district EP 7, voting district EP 15, voting district EP 16, voting district EP 17 and voting district EP 18 of the District Three magisterial district and that portion of voting district EP 2, voting district EP 5 and voting district EP 9 of the District Two magisterial district of Boone county shall constitute the twentieth delegate district and shall elect four delegates: *Provided,* That not more than three delegates may be nominated, elected or appointed who are

residents of any single county within the twentieth delegate district;

(21) That portion of Boone county not included in the twentieth delegate district shall constitute the twenty-first delegate district and shall elect one delegate;

(22) The county of McDowell shall constitute the twenty-second delegate district and shall elect two delegates;

(23) The county of Wyoming and voting district EP 3 and voting district EP 5 of magisterial District I, and Block 201, Block 202 and Block 204B of Block Group 2 in Census Tract 9518 contained in voting district EP 96 and that portion of Census Tract 9517 contained in voting district EP 96 of magisterial District II of Mercer county, and voting district EP 41, voting district EP 42, voting district EP 46, voting district EP 49, voting district EP 51, voting district EP 55, voting district EP 60, voting district EP 69 of magisterial District III of Mercer county shall constitute the twenty-third delegate district and shall elect two delegates;

(24) All of magisterial District I except voting district EP 1, voting district EP 3 and voting district EP 5, and voting district EP 79 of magisterial District II, and voting district EP 61, voting district EP 63, voting district EP 67 and voting district EP 68 of magisterial District III of Mercer county shall constitute the twenty-fourth delegate district and shall elect one delegate;

(25) That portion of Mercer county not included in the twenty-third or twenty-fourth delegate district shall constitute the twenty-fifth delegate district and shall elect two delegates;

(26) The county of Monroe and voting district EP 1, voting district EP 13, voting district EP 30, voting district EP 31, voting district EP 32 and voting district EP 33 of the Greenbrier River magisterial district of Summers county shall constitute the twenty-sixth delegate district and shall elect one delegate;

(27) The county of Raleigh except Block 101, Block 102, Block 103, Block 104, Block 106, Block 107, Block 108, Block 109, Block 137, Block 138, Block 142 and Block 143 of Block Group 1 in Census Tract 0112 contained in voting district EP 61, and Block 301, Block 302. Block 303. Block 305, Block 330, Block 331, Block 332, Block 333. Block 334, Block 347, Block 348. Block 353 and Block 354 of Block Group 3 in Census Tract 0112 contained in voting district EP 61 in the District Two magisterial district and that portion of Summers county not included in the twenty-sixth delegate district shall constitute the twenty-seventh delegate district and shall elect five delegates: *Provided,* That not more than four delegates may be nominated, elected or appointed who are residents of any county within the twenty-seventh delegate district:

(28) The county of Greenbrier except voting district EP 54 in the Meadow Bluff magisterial district shall constitute the twenty-eighth delegate district and shall elect two delegates;

(29) All of the county of Fayette, voting district EP 54 in the Meadow Bluff magisterial district of Greenbrier county, voting district EP 131 and voting district EP 132 in the District One magisterial district of Kanawha county, voting district EP 25 in the Jefferson magisterial district of Nicholas county, and Block 101, Block 102. Block 103, Block 104, Block 106, Block 107, Block 108. Block 109, Block 137, Block 138, Block 142 and Block 143 of Block Group 1 in Census Tract 0112 contained in voting district EP 61 and

Block 301, Block 302, Block 303. Block 305 Block 330, Block 331, Block 3.32. Block 333, Block 334, Block 347, Block 348, Block 353 and Block 354 of Block Group 3 in Census Tract 0112 contained in voting district EP 61 in the District Two magisterial district of Raleigh county shall constitute the twenty-ninth delegate district and shall elect three delegates:

(30) That portion of magisterial District One not included in the twenty-ninth delegate district, all of the magisterial District Two, voting district EP 307, voting district EP 310. voting district EP 312, voting district EP 313, voting district EP 314. voting district EP 350, voting district EP 352, voting district EP 353, voting district EP 355, voting district EP 356, that portion of voting district EP 357, voting district EP 360, voting district EP 379 and that portion of Block Group 1 in Census Tract 0132 contained in voting district EP 311, Block 2()1. Block 206, Block 207 and Block 208 of Block Group 2 in Census Tract 0132 contained in voting district EP 311, that portion of Block Group 3 in Census Tract 0132 contained in voting district EP 311, Block 101, Block 102B, Block 120, Block 121, Block 122, Block 123, Block 124, Block 125, Block 126, Block 127, Block 128, Block 129, Block 130, Block 131, Block 132, Block 133, Block 134, Block 140, Block 141, Block 142, Block 143 and Block 199B of Block Group 1 in Census Tract 0134 contained in voting district EP 311 of magisterial District Three, voting district EP 412, voting district E P 414, voting district EP 444, voting district EP 447, voting district EP 448, voting district EP 449, voting district EP 450, voting district EP 453, voting district EP 454, voting district EP 455, voting district EP 459, voting district EP 462, voting district EP 463. that portion of voting district EP 311, that portion of voting district EP 350, that portion of voting district EP 355, that portion of voting district EP 360 and that portion of voting district EP 504 of the magisterial District Four, voting district EP 501, voting district EP 502,

that portion of voting district EP 504, voting district EP 508, voting district EP 509, voting district EP 510, voting district EP 513, voting district EP 515, voting district EP 526, voting district EP 527, voting district EP 528, voting district EP 529, voting district EP 542, voting district E P 546, voting district EP 547, voting district EP 549, voting district EP 553, voting district EP 573, Block 201, Block 202, Block 203, Block 204, Block 205, Block 206, Block 207, Block 208. Block 209, Block 210, Block 211, Block 212, Block 213, Block 214 and Block 215 of Block Group 2 in Census Tract 0005 contained in voting district EP 541, Block 304 of Block Group 3 in Census Tract 0005 contained in voting district EP 541, Block 305 of Block Group 3 in Census Tract 0011 contained in voting district EP 541, that portion of Census Tract 0110 contained in voting district EP 541, Block 501A and Block-504 of Block Group 5 in Census Tract 0011 contained in voting district EP 572 of magisterial District Five and voting district EP 617, voting district EP 620, voting district EP 641, voting district EP 642, voting district EP 644 and voting district EP 653 of magisterial District Six of Kanawha county shall constitute the thirtieth delegate district and shall elect seven delegates;

(31) That portion of magisterial District Five of Kanawha county not included in the thirtieth delegate district shall constitute the thirty-first delegate district and shall elect one delegate;

(32) That portion of Kanawha county not included in the twenty-ninth, thirtieth or thirty-first delegate district shall constitute the thirty-second delegate district and shall elect four delegates;

(33) The counties of Calhoun and Clay and voting district EP 12 and voting district EP 13 of the DeKalb-Troy magisterial

district of Gilmer county shall constitute the thirty-third delegate district and shall elect one delegate;

(34) The county of Braxton and the Center magisterial district, the City magisterial district and the Glenville magisterial district of Gilmer county shall constitute the thirty-fourth delegate district and shall elect one delegate;

(35) The Grant magisterial district, the Hamilton magisterial district, the Summersville magisterial district, the Wilderness magisterial district, voting district EP 16 of the Beaver magisterial district, voting district EP 24, voting district EP 26 and voting district EP 27 of the Jefferson magisterial district, and voting district EP 28, voting district EP 29 and voting district EP 30 of the Kentucky magisterial district of Nicholas county shall constitute the thirty-fifth delegate district and shall elect one delegate;

(36) The county of Webster and that portion of Nicholas county not included in the twenty-ninth or thirty-fifth delegate district shall constitute the thirty-sixth delegate district and shall elect one delegate;

(37) The counties of Pocahontas and Randolph shall constitute the thirty-seventh delegate district and shall elect two delegates;

(38) The county of Lewis and voting district EP 4 and voting district EP 7 of the Banks magisterial district of Upshur county shall constitute the thirty-eighth delegate district and shall elect one delegate;

(39) The Buckhannon magisterial district. the Meade magisterial district, the Washington magisterial district, voting district VTD 10, voting district EP 35. that portion of voting district EP 14 and that portion of voting district EP 15

of the Union magisterial district and voting district EP 6 of the Banks magisterial district of Upshur county shall constitute the thirty-ninth delegate district and shall elect one delegate;

(40) The county of Barbour and that portion of Upshur county not included in the thirty-eighth or thirty-ninth delegate district shall constitute the fortieth delegate district and shall elect one delegate;

(41) The county of Harrison shall constitute the forty-first delegate district and shall elect four delegates;

(42) The county of Taylor, voting district EP 125 of the Palatine magisterial district of Marion county, and voting district EP 62 of the Eastern magisterial district of Monongalia county shall constitute the forty-second delegate district and shall elect one delegate;

(43) That portion of Marion county not included in the forty-second delegate district shall constitute the forty-third delegate district and shall elect three delegates;

(44) That portion of Monongalia county not included in the forty-second delegate district shall constitute the forty-fourth delegate district and shall elect four delegates;

(45) All of the Grant magisterial district, all of the Kingwood magisterial district, all of the Pleasant magisterial district, voting district EP 25 of the Reno magisterial district, that portion of voting district EP 6. voting district EP 17, voting district EP 18 and voting district EP 19 of the Portland magisterial district and voting district EP 9, voting district EP 12, that portion of Block Group 1 in Census Tract 9639 contained in voting district EP 10, that portion of Block Group 4 in Census Tract 9639 contained in voting district EP 10, and Block 301, Block 302, Block 303, Block 304, Block

305B, Block 312B, Block 313, Block 314, Block 319, Block 320, Block 321, Block 322, Block 323, Block 324, Block 326, Block 337, Block 338 and Block 399 of Block Group 3 in Census Tract 9639 contained in voting district EP 10, and Block 331, Block 332, Block 333, Block 334, Block 335, Block 336, Block 337, Block 338B, Block 340B, Block 349, Block 350, Block 351, Block 352, Block 353, Block 354, Block 355, Block 356, Block 357, Block 358, Block 359, Block 360, Block 361, Block 362, Block 363, Block 364, Block 365, Block 366, Block 367, Block 368 and Block 399C of Block Group 3 in Census Tract 9643 contained in voting district EP 11 of the Valley magisterial district of Preston county shall constitute the forty-fifth delegate district and shall elect one delegate;

(46) The county of Tucker and that portion of Preston county not included in the forty-fifth delegate district shall constitute the forty-sixth delegate district and shall elect one delegate;

(47) The county of Hardy and all of the county of Pendleton except voting district EP 13 of the Union magisterial district shall constitute the forty-seventh delegate district and shall elect one delegate;

(48) The county of Grant and voting district EP 1, voting district EP 2, voting district EP 3, voting district EP 6, voting district EP 8, voting district EP 27, voting district EP 28, voting district EP 29, voting district EP 30, voting district EP 31, voting district EP 34 and voting district EP 35 of magisterial District One of Mineral county, and voting district EP 13 of the Union magisterial district of Pendleton county shall constitute the forty-eighth delegate district and shall elect one delegate;

(49) All of magisterial District Two, voting district EP 4 and voting district EP 5 of magisterial District One, and that

portion of voting district EP 5, voting district EP 7, voting district EP 10, voting district EP 12, voting district EP 13, voting district EP 14 and voting district EP 15 of magisterial District Three of Mineral county shall constitute the forty-ninth delegate district and shall elect one delegate;

(50) The county of Hampshire and that portion of Mineral county not included in the forty-eighth or forty-ninth delegate district shall constitute the fiftieth delegate district and shall elect one delegate;

(51) The county of Morgan and voting district EP 40, voting district EP 41 and voting district EP 42 of the Hedgesville magisterial district of Berkeley county shall constitute the fifty-first delegate district and shall elect one delegate;

(52) All of the Martinsburg magisterial district, that portion of voting district EP 2, voting district EP 2A that portion of voting district EP 5, voting district EP 9, voting district EP 11, voting district EP 12, voting district EP 13 and that portion of voting district EP 22 of the Arden magisterial district, voting district EP 10, voting district EP 38, voting district EP 39 and voting district VTD 99 of the Hedgesville magisterial district and voting district EP 15 and voting district EP 17A of the Opequon magisterial district of Berkeley county shall constitute the fifty-second delegate district and shall elect one delegate;

(53) All of the Gerrardstown magisterial district, all of the Mill Creek magisterial district and voting district EP 29, voting district EP 31, voting district EP 34, voting district EP 35 and Block 119, Block 127, Block 128, Block 130, Block 134, Block 135, Block 136 Block 137, Block 138, Block 139, Block 140, Block 141, Block 142 and Block 143 of Block Group 1 in Census Tract 9720 contained in voting district EP 25 of the Arden magisterial district of Berkeley county shall

constitute the fifty-third delegate district and shall elect one delegate;

(54) That portion of Berkeley county not included in the fifty-first, fifty-second or fifty-third delegate district shall constitute the fifty-fourth delegate district and shall elect one delegate;

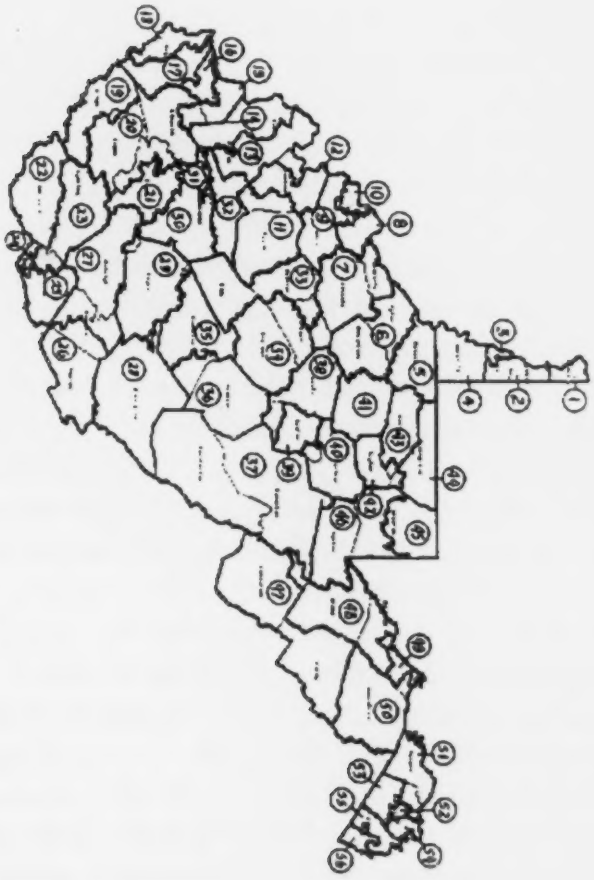
(55) All of the Middleway magisterial district, all of the Shepherdstown magisterial district, voting district EP 22 of the Kabletown magisterial district and voting district EP 13 of the Harpers Ferry magisterial district of Jefferson county shall constitute the fifty-fifth delegate district and shall elect one delegate; and

(56) That portion of Jefferson county not included in the fifty-fifth delegate district shall constitute the fifty-sixth delegate district and shall elect one delegate.

(d) Regardless of the changes in delegate district boundaries made by the provisions of subsection (c) of this section, the delegates elected at the general election held in the year one thousand nine hundred ninety shall continue to hold their offices as members of the House of Delegates for the term, and as representatives of the county or delegate district, for which each thereof, respectively, was elected. Any appointment made prior to the first day of December, one thousand nine hundred ninety-two, to fill a vacancy in the office of a member of the House of Delegates shall be made for the remainder of the term, and as representative of the county or delegate district, for which the vacating delegate was elected or appointed.

(e) In amending and reenacting this section, it is not the intention of the Legislature to alter or change the arrangement of the delegate districts and the apportionment of delegates as

they were intended to be adopted in the prior enactment of this section subsequent to the United States census for the year one thousand nine hundred ninety. Rather, it is the intent of the Legislature in amending this section to have the language comport with the maps relied upon by the Legislature and section after the census, the map attached to Enrolled House Bill 301 (1991 third extraordinary session) and to correct certain other technical errors, such amendments being necessary to reflect the intention of the Legislature at the time of its initial reenactment of this section after the census.



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APPENDIX F

ENROLLED
Senate Bill No. 1

(BY SENATOR WOOTON)

[Passed December 9, 1991; in effect from passage.]

AN ACT to amend and reenact section one, article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to apportionment of the Senate into seventeen senatorial districts for the purpose of electing thirty-four members; defining terms; and requiring all actions necessary and related to such apportionment.

Be it enacted by the Legislature of West Virginia:

That section one, article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 2. APPORTIONMENT OF REPRESENTATION

§1-2-1. Senatorial districts.

(a) This section shall be known and may be cited as "The Senate Redistricting Act of 1991".

(b) As used in this section:

(1) "County" means the territory comprising a county of this state as such county existed on the first day of January, one thousand nine hundred ninety, notwithstanding any boundary changes thereof made subsequent thereto;

(2) "Block", "block group", "census tract" and "voting district" mean those geographic areas as defined by the bureau of the census of the United States department of commerce for the taking of the one thousand nine hundred ninety census of population and described on census maps prepared by the bureau of the census. Such maps are, at the time of this enactment, maintained by the bureau of the census and filed in the office of legislative services;

(3) "Magisterial district" means the territory comprising a magisterial district of this state as reported to and used by the bureau of the census of the United States department of commerce for the taking of the one thousand nine hundred ninety census of population and described on census maps prepared by the bureau of the census;

(4) "Incumbent senator" means a senator elected at the general election held in the year one thousand nine hundred ninety or at any general election thereafter, with an unexpired term of at least two years in duration.

(c) The Legislature recognizes that in dividing the state into senatorial districts, the Legislature is bound not only by the United States constitution but also by the West Virginia constitution; that in any instance where the West Virginia constitution conflicts with the United States constitution, the United States constitution must govern and control, as recognized in section one, article one of the West Virginia constitution; that the United States constitution, as interpreted by the United States supreme court and other federal courts, requires state legislatures to be apportioned so as to achieve equality of population as near as is practicable, population disparities being permissible where justified by rational state policies; and that the West Virginia constitution requires two senators to be elected from each senatorial district for terms of four years each, one such senator being elected every two

years, with one half of the senators being elected biennially, and requires senatorial districts to be compact, formed of contiguous territory and bounded by county lines. The Legislature finds and declares that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States supreme court and other federal courts and at the same time adhere to all of these provisions of the West Virginia constitution; but that, in an effort to adhere as closely as possible to all of these provisions of the West Virginia constitution, the Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) hereof, has:

(1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year one thousand eight hundred sixty-three, each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines;

(2) Made the senatorial districts as compact as possible, consistent with the equality of population concept;

(3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia supreme court of appeals;

(4) Deviated from the long-established state policy, recognized in (1) above, by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of

territory and to achieve acceptable equality of population; and

(5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

(d) The Senate shall be composed of thirty-four senators, one senator to be elected at the general election to be held in the year one thousand nine hundred ninety-two, and biennially thereafter for a four-year term from each of the senatorial districts hereinafter in this subsection described and constituted as follows:

(1) The counties of Brooke and Hancock and all of magisterial District One of Ohio county and voting district EP 9, voting district EP 20, voting district EP 28, voting district EP 31, voting district EP 113, voting district EP 115, voting district EP 116, voting district EP 119, voting district EP 120, Block 302D and Block 320 of Block Group 3 in Census Tract 0002 contained in voting district EP 24, Block 405B, Block 422 and Block 499B of Block Group 4 in Census Tract 0002 contained in voting district EP 24, Block 101, Block 102, Block 103, Block 104, Block 105, Block 106, Block 107, Block 108, Block 109, Block 110, Block 111, Block 112, Block 113, Block 114 and Block 116 of Block Group 1 in Census Tract 0004 contained in voting district EP 24, Block 201 of Block Group 2 in Census Tract 0004 contained in voting district EP 24, Block 105, Block 106, Block 107 Block 109A and Block 110A of Block Group 1 in Census Tract 0014 contained in voting district EP 43, Block 209A, Block 210, Block 211 and Block 212 of Block Group 2 in Census Tract 0014 contained in voting district EP 43, and Block 327, Block 328 and Block 329 of Block Group 3 in Census Tract 0015 contained in voting district EP 43 of magisterial District Two of Ohio county, and all of

magisterial District Three of Ohio county except voting district EP 87, voting district EP 95, voting district EP 100, voting district EP 103 and voting district EP 104 shall constitute the first senatorial district;

(2) The counties of Doddridge, Marshall, Ritchie, Tyler, Wetzel and that portion of the county of Ohio not included in the first senatorial district and voting district EP 66, voting district EP 70, voting district EP 72, voting district EP 74 and voting district EP 78 of the West Augusta magisterial district of the county of Marion shall constitute the second senatorial district;

(3) The counties of Calhoun, Pleasants, Wirt and Wood shall constitute the third senatorial district;

(4) The counties of Jackson, Mason, Putnam and Roane shall constitute the fourth senatorial district;

(5) The county of Cabell and voting district EP 12, voting district VTD 101, Block 103 of Block Group 1 in Census Tract 0202 contained in voting district EP 11, Block 199B of Block Group 1 in Census Tract 0202 contained in voting district EP 59, and Block 101B and Block 199E of Block Group 1 in Census Tract 0202 contained in voting district EP 21 in the Ceredo magisterial district, and that portion of voting district EP 59, voting district EP 63 and Block 101, Block 102, Block 103, Block 104 and Block 105 of Block Group 1 in Census Tract 0051 contained in voting district EP 60 in the Westmoreland magisterial district of the county of Wayne shall constitute the fifth senatorial district;

(6) The counties of McDowell and Mingo, voting district EP 41, voting district EP 42, voting district EP 49, voting district EP 52, voting district EP 60, voting district EP 61, Block 412B, Block 415, Block 416, Block 417B and Block 422B of

Block Group 4 in Census Tract 9509 contained in voting district EP 46, Block 510 of Block Group 5 in Census Tract 9509 contained in voting district EP 46, Block 304B of Block Group 3 in Census Tract 9510 contained in voting district EP 46, Block 405C, Block 412D, Block 414, Block 417, Block 418B, Block 419B, Block 422, Block 423, Block 424 and Block 425 of Block Group 4 in Census Tract 9516 contained in voting district EP 63 of magisterial District III in the county of Mercer, and voting district EP 1, voting district EP 3, voting district EP 5, voting district EP 17, voting district EP 18, voting district EP 19, and Block 510 of Block Group 5 in Census Tract 0204 contained in voting district EP 22, and Block 219, Block 220, Block 221, Block 222, Block 224, Block 225, Block 228, Block 231 and Block 232 of Block Group 2 in Census Tract 0206 contained in voting district EP 22 of the Butler magisterial district in the county of Wayne, and voting district EP 13, voting district EP 15, voting district EP 20, Block 305A, Block 305C, Block 306A, Block 306C and Block 307 of Block Group 3 in Census Tract 0052 contained in voting district EP 11, Block 210A and Block 211A of Block Group 2 in Census Tract 0201 contained in voting district EP 11, Block 102, Block 104, Block 105, Block 106, Block 107, Block 108, Block 109, Block 110, Block 111, Block 112, Block 113, Block 114, Block 115, Block 116, Block 117, Block 118, Block 119, Block 120, Block 121 and Block 199A of Block Group 1 in Census Tract 0202 contained in voting district EP 11, Block 225 and Block 226 of Block Group 2 in Census Tract 0202 contained in voting district EP 11, and Block 218A of Block Group 2 in Census Tract 0203 contained in voting district EP 11, and Block 101A, Block 102A, Block 103, Block 104, Block 120A, Block 122A, Block 122B, Block 124A, Block 156, Block 157 and Block 199A of Block Group 1 in Census Tract 0204 contained in voting district EP 11, Block 101B, Block 102, Block 103, Block 104, Block 105, Block 106, Block 107, Block 108, Block 109, Block 110, Block 111, Block

112, Block 113B, Block 114, Block 115, Block 116, Block 117, Block 119, Block 120, Block 121, Block 122, Block 123, Block 124 and Block 134 of Block Group 1 in Census Tract 0203 contained in voting district EP 21, Block 401, Block 402, Block 417 and Block 418 of Block Group 4 in Census Tract 0203 contained in voting district EP 21, Block 505, Block 520, Block 522 and Block 523 of Block Group 5 in Census Tract 0203 contained in voting district EP 21 of the Ceredo magisterial district in the county of Wayne, and voting district EP 30, voting district EP 31, voting district EP 34, voting district EP 36, voting district EP 37, and that portion of voting district EP 3 of the Stonewall magisterial district in the county of Wayne, and voting district EP 48, Block 318 of Block Group 3 in Census Tract 0206 contained in voting district EP 53, Block 144 and Block 145 of Block Group 1 in Census Tract 0207 contained in voting district EP 53, Block 255B of Block Group 2 in Census Tract 0207 contained in voting district EP 53, Block 464B of Block Group 4 in Census Tract 0206 contained in voting district EP 54, and Block 319B, Block 315B and Block 314B of Block Group 3 in Census Tract 0209 contained in voting district EP 54 of the Union magisterial district in the county of Wayne, and voting district EP 14, voting district EP 19, voting district EP 56, voting district EP 57, voting district EP 58, voting district EP 61, voting district EP 62 and Block 106 of Block Group 1 in Census Tract 0051 contained in voting district EP 60 of the Westmoreland magisterial district in the county of Wayne shall constitute the sixth senatorial district;

(7) The counties of Boone, Lincoln and Logan and that portion of the county of Wayne not included in the fifth or sixth senatorial districts shall constitute the seventh senatorial district;

(8) The county of Kanawha shall constitute the eighth senatorial district;

(9) The counties of Raleigh and Wyoming shall constitute the ninth senatorial district;

(10) The counties of Monroe and Summers and that portion of the county of Mercer not included in the sixth senatorial district, and voting district EP 68, voting district EP 72 and voting district EP 74 of the New Haven magisterial district of Fayette county, and voting district EP 3, voting district EP 4, voting district EP 5, voting district EP 9, voting district EP 10, voting district EP 11, voting district EP 12, voting district EP 14, voting district EP 19, voting district EP 23, voting district EP 24, Block 226A, Block 228A, Block 229 and Block 230 of Block Group 2 in Census Tract 0202 contained in voting district EP 8, Block 312A, Block 312B, Block 312C, Block 317A, Block 317B, Block 318, Block 319, Block 320A, Block 320B, Block 321, Block 322A, Block 322B, Block 323, Block 324, Block 325, Block 326, Block 327 and Block 328 of Block Group 3 in Census Tract 0202 contained in voting district EP 8, Block 401A, Block 409, Block 410, Block 411, Block 412, Block 413, Block 414A, Block 415, Block 416 and Block 417 of Block Group 4 in Census Tract 0202 contained in voting district EP 8, Block 536, Block 539, Block 540, Block 541, Block 542, Block 543, Block 544, Block 545, Block 546, Block 547, Block 548, Block 552, Block 553, Block 554 and Block 555 of Block Group 5 in Census Tract 0202 contained in voting district EP 8, Block 330, Block 331, Block 334, Block 335, Block 337, Block 338, Block 339, Block 340, Block 342, Block 343, Block 344, Block 345, Block 346 and Block 347 of Block Group 3 in Census Tract 0203 contained in voting district EP 13, Block 101A, Block 101B, Block 102A, Block 102B, Block 103, Block 104, Block 105, Block 106, Block 108, Block 109, Block 110, Block 111, Block 112, Block 113, Block 114, Block 116, Block 117, Block 119, Block 120, Block 121A, Block 121B, Block 122, Block 123A,

Block 123B, Block 124A, Block 124B, Block 125A, Block 126, Block 127 and Block 128 of Block Group 1 in Census Tract 0204 contained in voting district EP 13, Block 501A, Block 503, Block 504, Block 505, Block 506, Block 507, Block 508, Block 509, Block 510, Block 511, Block 512, Block 513, Block 514, Block 515, Block 516, Block 517, Block 518, Block 519, Block 520, Block 521, Block 522, Block 523A, Block 524, Block 525A, Block 526, Block 527A, Block 528A, Block 528B, Block 529A, Block 532, Block 534A, Block 535, Block 537, Block 538, Block 549, Block 550 and Block 551 of Block Group 5 in Census Tract 0202 contained in voting district EP 15, Block 601A of Block Group 6 in Census Tract 0202 contained in voting district EP 15, Block 307, Block 309A, Block 309B and Block 315 of Block Group 3 in Census Tract 0202 contained in voting district EP 16, and Block 234A of Block Group 2 in Census Tract 0206 contained in voting district EP 18 of the Plateau magisterial district of Fayette county shall constitute the tenth senatorial district;

(11) The counties of Clay, Greenbrier, Nicholas and Webster and that portion of the county of Fayette not included in the tenth senatorial district shall constitute the eleventh senatorial district;

(12) The counties of Braxton, Gilmer, Harrison and Lewis shall constitute the twelfth senatorial district;

(13) That portion of the county of Marion not included in the second senatorial district, and all of the Central magisterial district of Monongalia county, and voting district EP 40, voting district EP 41, voting district EP 42, voting district EP 44, voting district EP 46, voting district EP 47, voting district EP 49, voting district EP 51, voting district EP 52, voting district EP 53, voting district EP 54, voting district EP 55, voting district EP 56, voting district EP 58, voting district EP

70, voting district EP 71, voting district EP 72, voting district EP 73, voting district EP 74, voting district EP 75 and Block 301B, Block 302B and Block 399B of Block Group 3 in Census Tract 0112 contained in voting district EP 48, Block 401, Block 402, Block 403, Block 404, Block 405, Block 406, Block 407, Block 408, Block 409, Block 410, Block 411, Block 412, Block 413A, Block 413B, Block 414, Block 415, Block 416, Block 417, Block 418, Block 419, Block 420, Block 421, Block 422, Block 423, Block 424, Block 425 and Block 499 of Block Group 4 in Census Tract 0112 contained in voting district EP 48, Block 501B, Block 502A, Block 502B, Block 502C, Block 503A, Block 503B, Block 503C, Block 504A, Block 504B, Block 505A, Block 505B, Block 506, Block 507A, Block 507B, Block 508, Block 509A, Block 509B, Block 510, Block 511, Block 512, Block 513, Block 514A, Block 514B, Block 515A, Block 515B, Block 516A, Block 516B, Block 517, Block 518, Block 519A, Block 519B, Block 520A, Block 520B, Block 521A and Block 521B of Block Group 5 in Census Tract 0112 contained in voting district EP 48, Block 301, Block 302, Block 303, Block 304, Block 305, Block 306, Block 307, Block 308, Block 309, Block 311, Block 312, Block 313, Block 314, Block 315, Block 316, Block 317, Block 355A, Block 355B, Block 357A, Block 357B, Block 358, Block 360, Block 362 and Block 399 of Block Group 3 in Census Tract 0115 contained in voting district EP 48 of the Western magisterial district of Monongalia county, and that portion of voting district EP 22, that portion of voting district EP 30, voting district EP 32, voting district EP 36, voting district EP 39, voting district EP 76, voting district EP 80, voting district EP 81, voting district EP 82, voting district EP 83, voting district EP 84, voting district EP 86, that portion of voting district EP 87, voting district EP 88, voting district EP 89, voting district EP 91, Block 418B, Block 419C, Block 419D and Block 421B of Block Group 4 in Census Tract 0108 contained in voting district EP 35, Block 101D, Block 102,

Block 103, Block 105 and Block 110 of Block Group 1 in Census Tract 0109 contained in voting district EP 35, Block 731B, Block 732B, Block 733 and Block 734B of Block Group 7 in Census Tract 0109 contained in voting district EP 35, Block 801C, Block 802, Block 803, Block 804, Block 805, Block 806B, Block 807, Block 811, Block 812 and Block 813 of Block Group 8 in Census Tract 0109 contained in voting district EP 35, Block 315B of Block Group 3 in Census Tract 0110 contained in voting district EP 35, Block 599A of Block Group 5 in Census Tract 0116 contained in voting district EP 79, Block 126, Block 127, Block 128, Block 132, Block 133, Block 134, Block 135, Block 136, Block 137A, Block 137B, Block 138, Block 139, Block 140, Block 141, Block 142, Block 143, Block 144, Block 145, Block 146, Block 147, Block 148, Block 149, Block 150, Block 151, Block 152, Block 153, Block 154, Block 155, Block 156A, Block 156B, Block 157, Block 158, Block 159, Block 160, Block 161, Block 162, Block 163, Block 164, Block 165, Block 166, Block 167, Block 168, Block 169, Block 170, Block 171, Block 172, Block 173, Block 174, Block 175, Block 176, Block 177, Block 178, Block 179, Block 180, Block 181, Block 182, Block 183, Block 184, Block 185, Block 186, Block 187, Block 199A, Block 199B, Block 199F, Block 199G, Block 199H and Block 199J of Block Group 1 in Census Tract 0117 contained in voting district EP 79, Block 613B of Block Group 6 in Census Tract 0110 contained in voting district EP 85, and Block 701, Block 702B and Block 703 of Block Group 7 in Census Tract 0110 contained in voting district EP 85 of the Eastern magisterial district of Monongalia county shall constitute the thirteenth senatorial district;

(14) The counties of Barbour, Preston, Taylor and Tucker and that portion of the county of Monongalia not included in the thirteenth senatorial district, and all of the Union magisterial district of Grant county, and all of magisterial District Two of

Mineral county, and voting district EP 2, voting district EP 3, voting district EP 4, voting district EP 6, voting district EP 8, voting district EP 27, voting district EP 28, voting district EP 29, voting district EP 30, voting district EP 31, voting district EP 35 and that portion of voting district EP 5 in magisterial District One of Mineral county, and voting district EP 10, voting district EP 12, voting district EP 13, voting district EP 14, voting district EP 15, voting district EP 32 and that portion of voting district EP 5 in magisterial District Three of Mineral county shall constitute the fourteenth senatorial district;

(15) The counties of Hampshire, Hardy, Randolph, Pendleton, Pocahontas and Upshur and that portion of the county of Grant not included in the fourteenth senatorial district, and that portion of the county of Mineral county not included in the fourteenth senatorial district shall constitute the fifteenth senatorial district;

(16) The counties of Berkeley, Jefferson and Morgan shall constitute the sixteenth senatorial district; and

(17) The county of Kanawha shall constitute the seventeenth senatorial district.

(e) The West Virginia constitution further provides, in section four, article VI thereof, that where a senatorial district is composed of more than one county, both senators for such district shall not be chosen from the same county, a residency dispersal provision which is clear with respect to senatorial districts which follow county lines, as required by such constitution, but which is not clear in application with respect to senatorial districts which cross county lines. However, in an effort to adhere as closely as possible to the West Virginia constitution in this regard, the following additional provisions, in furtherance of the rationale of such residency

dispersal provision and to give meaning and effect thereto, are hereby established:

(1) With respect to a senatorial district which is composed of one or more whole counties and one or more parts of another county or counties, no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district;

(2) With respect to a senatorial district which does not contain any whole county but only parts of two or more counties, no more than one senator shall be chosen from the same part to represent such senatorial district; and

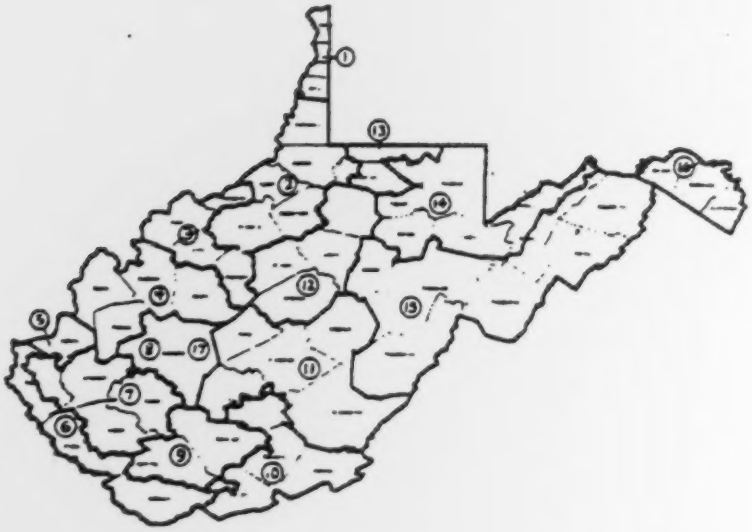
(3) With respect to superimposed senatorial districts which contain only one whole county, all senators shall be chosen from such county to represent such senatorial districts.

(f) Candidates for the Senate shall be nominated as provided in section four, article five, chapter three of this code, except that such candidates shall be nominated in accordance with the residency dispersal provisions specified in section four, article VI of the West Virginia constitution and the additional residency dispersal provisions specified in subsection (e) hereof. Candidates for the Senate shall also be elected in accordance with the residency dispersal provisions specified in said section four, article VI of the West Virginia constitution and the additional residency dispersal provisions specified in subsection (e) hereof. In furtherance of the foregoing provisions of this subsection (f), no person may file a certificate of candidacy for election from a senatorial district described and constituted in subsection (d) hereof if he or she resides in the same county and the same such senatorial district wherein also resides an incumbent senator, whether the senatorial district wherein such incumbent senator resides was described and constituted by chapter

ninety-nine, acts of the Legislature, one thousand nine hundred eighty-two, or was described and constituted in subsection (d) hereof. Any vacancy in a nomination shall be filled, any appointment to fill a vacancy in the Senate shall be made, and any candidates in an election to fill a vacancy in the Senate shall be chosen, so as to be consistent with the residency dispersal provisions specified in section four, article VI of the West Virginia constitution and the additional residency dispersal provisions specified in subsection (e) hereof.

(g) Regardless of the changes in senatorial district boundaries made by the provisions of subsection (d) hereof, all senators elected at the general election held in the year one thousand nine hundred eighty-eight and at the general election held in the year one thousand nine hundred ninety shall continue to hold their seats as members of the Senate for the term, and as representatives of the senatorial district, for which each thereof, respectively, was elected. Any appointment made or election held to fill a vacancy in the Senate shall be for the remainder of the term, and as a representative of the senatorial district, for which the vacating senator was elected or appointed, and any such election shall be held in the district as the same was described and constituted at the time the vacating senator was elected or appointed.

(h) The secretary of state may promulgate rules and regulations to implement the provisions of this section, including emergency rules and regulations promulgated pursuant to the provisions of section five, article three, chapter twenty-nine-a of this code.



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No. 92-_____

Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PETER HOLLOWAY, *et al.*,
Appellants,
v.
KEN HECHLER, *et al.*,
Appellees.

On Appeal from the United States District Court
For the Southern District of West Virginia, Charleston

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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QUESTIONS PRESENTED

In a challenge as to population variances existing in a state legislative redistricting plan, may the District Court properly require plaintiffs to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment of the United States Constitution before requiring the defendants to show a legitimate state policy in support of the plan?

May the District Court dismiss a population-based malapportionment claim based upon *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) and the authorities cited therein?

Absent evidence of invidious discrimination which supports findings by the Court that the political processes leading to the nomination and election were not equally open to participation by the group in question as a result of the utilization of multimember legislative districts, may the District Court refuse to invalidate a redistricting plan which includes multimember districts when the state's redistricting plans have historically used a mix of single-member and multimember districts?

May the District Court properly dismiss a claim of partisan gerrymandering based upon findings that the plaintiffs failed to prove purposeful discrimination against an identifiable political group or any actual discriminatory effect on that group in light of the recent decision of the Fourth Circuit Court in the case of *Republican Party of North Carolina v. Martin*?

Are challenges to a state legislative redistricting plan which are based upon the Guaranty Clause of the United States Constitution nonjusticiable?

What judicially manageable standard can the Court apply to a claim that a state legislature has gerrymandered a redistricting plan by diluting the votes of citizens belonging to the majority party who might have voted for candidates of the minority party?

THE PARTIES

Appellants, plaintiffs in the action below, are as follows: Peter Holloway, David Tyson, Chester L. Woollard, Marie Woollard, Mary Anne Osborne, T. David Higgins, Gary A. King, and Opie Rollyson.

Appellees, defendants in the action below, are as follows: Ken Hechler, in his official capacity as Secretary of State of the State of West Virginia, Robert "Chuck" Chambers, in his official capacity as Speaker of the West Virginia House of Delegates, and Keith Burdette, in his official capacity as President of the West Virginia Senate.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PETER HOLLOWAY, *et al.*,
Appellants,
v.
KEN HECHLER, *et al.*,
Appellees.

MOTION IN THE ALTERNATIVE
TO DISMISS OR TO AFFIRM

May it please the Court:

Appellees move that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question or that the decision of the District Court be affirmed because it is so obviously correct under the principles and standards regarding legislative redistricting established by this Court in *White v. Regester,*412 U.S. 755,(1973); *Davis v. Bandemer, 478 U.S. 109 (1986); Mobile v. Bolden,* 446 U.S. 55 (1979); and *Badham v. March Fong Eu,* 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd,* 488 U.S. 1024 (1988), as to warrant no further review by this Court.

Opinion Below

The Memorandum Opinion and Judgment Order, which have not yet been officially reported, are set forth in Appendix A of appellants' Jurisdictional Statement.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellants' Jurisdictional Statement.

Constitutional and Statutory Provisions

Pertinent constitutional and statutory provisions are set forth in the appellants' Jurisdictional Statement.

Statement of the Case

The West Virginia Legislature consists of a one hundred member House of Delegates and a thirty-four member Senate. Delegates serve for terms of two years, with elections for all seats occurring in every even-numbered year. Senators serve for terms of four years, with half of the seats up for election in every even-numbered year. Senators are, in effect, elected from single-member districts, while Delegates have traditionally been elected from a mixture of single-member and multimember districts.

During the Third Extraordinary Session of the Legislature in 1991, the Legislature passed House Bill 301, amending *W.Va. Code*, §1-2-2, to apportion the membership of the House of Delegates of the State of West Virginia into delegate districts. Then, during the 1992 Regular Session of the Legislature, House Bill 4043 was passed, effective from passage, again reeenacting *W.Va. Code*, §1-2-2, making certain technical corrections to reflect the intent of the Legislature as to redistricting the House of Delegates.

In December, 1991, when the West Virginia Legislature reapportioned the House and Senate Districts pursuant to the results of the 1990 Federal census, there were Democrat majorities in both the House and the Senate. In the Senate, thirty-three of the thirty-four members were Democrats and one Senator was a Republican. In the House of Delegates, seventy-four of the one hundred members were Democrats and twenty-six members were Republicans.

The House Select Committee on Redistricting was composed of 16 Delegates, made up of 12 Democrats and 4 Republicans. It should be noted that the then current Republican membership of the House of Delegates was 26% of the total membership of the House, and that the Republican membership of the Redistricting Committee constituted 25% of that Committee's membership.

It is also noteworthy that with regard to the four Republican members of the House Redistricting Committee, Delegate Burk was and is the Minority Leader of the House and a member of the Rules Committee, Delegate Faircloth was and is is a member of the Rules Committee, Delegate Lane was Minority Chair of the House Judiciary Committee, and Delegate McKinley was and is Minority Chair of the House Finance Committee and State Chairman of the Republican party. Given this representation, any disingenuous claim of a lack of representation would appear to be foreclosed.

The redistricting plan in HB4043, adopted for the House of Delegates, provides for 33 single-member districts for the House, 12 two-member districts, 5 three-member districts, 4 four-member districts, 1 five-member

district and 1 seven-member district. The most overpopulated district created by HB4043 has a relative deviation of 4.97 per cent greater, and the most underpopulated one a relative deviation of minus 5 per cent less, than the "ideal" population.

Following the redistricting of the Legislature, on January 30, 1992, the plaintiffs brought their action for injunctive and declaratory relief, alleging that West Virginia's legislative apportionment plan violates the Equal Protection Clause of the United States Constitution by failing to follow the "one person, one vote" rule,[1] that the plan denies certain voters representation through a scheme which uses population deviations and multimember districting,[2] that the plan constitutes a scheme of gerrymandering by which the votes of Republicans are debased or degraded,[3] that the plan violates the fundamental right of Republicans of freedom of speech and association,[4] and that the plan violates the Guaranty Clause of the United States Constitution.[5]

David Ellis, an employee of the Office of Legislative Services in the West Virginia Legislature, testified for the defendants. Mr. Ellis was assigned to redistricting activities for the Legislature, and worked with the House Select Committee on Redistricting. Mr. Ellis testified that the intitial working draft presented by staff to the Select Committee to begin debate was a map showing one hundred single-member districts for the House of Delegates. The Committee Chairman had indicated a

1. Complaint, paragraphs 16-56, pp. 5-15.
2. *Id.*, paragraphs 57-84, pp. 15-22.
3. *Id.*, paragraphs 85-100 pp. 22-27.
4. *Id.*, paragraphs 101-103, p. 28.
5. *Id.*, paragraphs 104-106, p. 29.

preference for single-member districts.[6] Mr. Ellis worked with members of the Select Committee and other members of the House of Delegates to draw proposed districts for their particular geographical areas.[7] The staff drew different permutations for various areas throughout the State, "every possible combination to spur debate, to give the legislators an idea of the different ways that they could draw districts in their area."[8] The staff drew districts that were within the five per cent population variance "to add fodder for discussion."[9] Although the computer software utilized by Committee staff would have allowed the input of voter registration and other political data, staff was instructed by the Chairman of the Committee not to utilize this utility.[10] Mr. Ellis described the process for drawing district lines, beginning in the two "panhandles" of the State, working around the outside of the State toward the core of the State. He was never given instructions to underpopulate the districts in the southern part of the State.[11]

Defendant Robert C. Chambers, Speaker of the House of Delegates, testified for the defendants that, as Speaker, he had advocated that the effort in redistricting "ought to result in more single-member districts and smaller multi-member districts," and that he "did not advocate single-member districts across the board."[12] He believed that several delegations, e.g., Kanawha County and his own delegation from Cabell County, were larger than they should be, and that "those areas should be divided in some fashion to create more than a single

6. Transcript of Proceedings, Feb. 26, 1992, p. 146.
7. *Id.*, pp. 147-149.
8. *Id.*, pp. 148-149.
9. *Id.*, p. 149.
10. *Id.*, p. 147.
11. *Id.*, pp. 149-150.
12. *Id.*, p. 169.

district."[13] He had not supported a particular plan for redistricting such areas, but would support some plan devised by other delegates which split the large delegations in some fashion.[14] In response to questioning from Judge Hall as to whether members of the Redistricting Committee were sure to take care of their own districts so they would be re-elected, Speaker Chambers responded as follows:

> Well, I think every member of the legislature, Democrat or Republican, advocated a position that they felt was best for them, including their opportunity to be re-elected. Certainly members of the committee probably did that. I know that not all were able to. I don't know to what degree. I know several members of the Redistricting Committee did not like the plan as it affected their area. That caused some of them to actually oppose it, some others said we don't like it, but we'll go ahead and support it because we think over all it's as good a plan as you're going to get.[15]

Speaker Chambers further testified that in the process of constructing districts, he was "not aware that there was a decision to add precincts or districts based upon partisanship, based upon [the] number of registered voters in any party."[16] The Speaker further testified that because of the massive registration majority that the Democrat Party has in the State of West Virginia, "it would be difficult, if not impossible, to try to create

13. *Id.*, pp. 169-170.
14. *Id.*, pp. 170-171.
15. *Id.*, p. 172.
16. *Id.*, p. 177.

through redistricting some enhanced chance for Republicans by going out and looking for Republican voters and putting them in precincts or districts where they will elect Republicans."

By order entered February 26, 1992, the three-judge court below denied the injunctive relief prayed for in the complaint, for various reasons set forth in the order. Thereafter, on September 29, 1992, the Court entered a memorandum opinion granting the defendants' motion that the plaintiffs' complaint be dismissed and judgment entered in favor of the defendants. On that same date, the Court entered a judgment order dismissing plaintiffs' complaint with prejudice, and granting judgment in favor of the defendants.

Argument

I. THE DISTRICT COURT PROPERLY REJECTED PLAINTIFFS' ASSERTION THAT THE DEFENDANTS WERE REQUIRED TO PROVE LEGITIMATE RATIONALE FOR POPULATION VARIANCES BELOW TEN PER CENT.

While it is unquestioned that the principal standard to be applied to legislative redistricting plans is that a "state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable",[17] the fact that a state legislative redistricting plan has a relative deviation of 9.97 per cent does not mean that this standard has been ignored or violated. In cases decided by this Court since *Reynolds v. Sims,* this Court has held that not all deviations from equal population among districts will require proof of a legitimate rationale for such

17. Reynolds v. Sims, 377 U.S. 533, 537 (1964).

deviations. In the case of *White v. Regester,*[18] this Court held that

> [i]t is plain from *Mahan v. Howell,* 410 U.S. 315 (1973) and *Gaffney v. Cummings, ante,* p. 735, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick v. Preisler* did not dilute the tolerances contemplated by *Reynolds v. Sims* with respect to state districting, and we did not hold in *Swann v. Adams,* 385 U.S. 440 (1967), or *Kilgarlin v. Hill* 386 U.S. 120 (1967), or later in *Mahan v. Howell,* supra, that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in *Gaffney v. Cummings, supra,* we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.[19]

The very idea of a deviation suggests that regions or districts will not be equal in population per representative. If the plaintiffs were to prevail on their claim that the plan embodied in HB4043 reflects regional bias, then it would effectively prohibit population deviations. Deviations, by definition, allow for different districts within a state to have variations in the number of persons allotted to each. Furthermore, there was no

18. White v. Regester, 412 U.S. 755 (1973).
19. *Id.,* 412 U.S. at 763-764.

testimony of intentional "regional bias". In light of the testimony admitted during the hearing, it does not appear that the District Court erred in determining that the Legislature had employed a good faith effort to achieve population equality.

When viewed in hindsight, one may be able to place many constructions on the contents of HB4043. Just as fourteen of the underpopulated districts are located in the middle or southern region of this state, thirteen are located on the state's borders. However, neither of these geographical phenomenon represent an identifiable political group. The presence of such an identifiable political group is necessary to maintain an equal protection claim.[20]

To maintain a claim of an equal protection violation, a showing of purposeful and invidious discrimination must be made.[21] As was stated in *Mobile v. Bolden,* "an illicit purpose must be proved before a constitutional violation can be found."[22] There is nothing in the record of the District Court to indicate that the defendants engaged in purposeful or invidious discrimination in the enactment of HB4043. The uncontroverted testimony was that no political information was available to any member from the Select Committee on Redistricting or its staff. In fact, the staff was told specifically not to use political data.[23] Furthermore, testimony indicated that due to the unusual borders of the state it is most practicable to begin drawing districts in the panhandles to avoid "painting yourself into a corner".[24] It was specifically stated by

20. *See,* Davis v. Bandemer, 478 U.S. 109 (1986).
21. Mobile v. Bolden, 446 U.S. 55 (1979).
22. Id., at 67.
23. See, Transcript of Proceedings, Feb. 26, 1992, p. 146-47.
24. *Id.,* at pp. 149-50 and pp. 164-65.

Committee staff that they were never instructed to underpopulate the southern counties.[25] It was also indicated that except for the requirement that all districts be drawn to meet constitutional standards of population and the general purpose of creating single-member districts and smaller multimember districts when practicable, members were generally concerned with their area of the state and there was no overall scheme to purposefully affect any particular region of the state or other identifiable group.[26]

The plaintiffs state that "[i]t is clearly possible to draw legislative districts of nearly equal population."[27] The fact that the Legislature has computer technology which would allow for the construction of legislative districts more nearly equal in population has no bearing on the issue of whether the plan embodied in HB4043 is constitutionally valid. This Court has long recognized that mathematical exactness will not be required in state redistricting plans. The Court's use of the phrase "as nearly equal as practicable" rather than the phrase "as nearly equal as possible" in redistricting opinions indicates that some deviation in the drawing of legislative districts will be permitted and that there are concerns, other than population, which may legitimately be addressed by a Legislature when constructing a redistricting plan. This idea was embodied in *Reynolds v. Sims*,[28] wherein it was stated that the Court

> realize[d] that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or

25. *Id.* at p. 150.
26. *Id.* at pp. 148-48 and pp. 166-67.
27. *See*, Jurisidictional Statement, p. 19.
28. Reynolds v. Sims, 377 U.S. 533 (1964).

> citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[29]

The testimony elicited in District Court indicates that many alternative plans could have been constructed which would have had population deviations within the ten per cent limitation. This fact is not contested. Chris Larsin testified that with use of a computer he could divide the state into one hundred single-member districts with a very small population deviation between districts. However, Mr. Larsin had not accomplished this feat nor did he explain how it could have been done.[30] He also testified that he could draw "thousands and thousands" of districting plans within the ten per cent variation permitted by the Supreme Court.[31] The witness Larsin could offer no criteria for recommending any given plan over others, except to say that he would try to maintain the ideal population for each district and try to maintain larger census units intact.[32] Larsin, an employee of the Republican National Party, testified that he would give no consideration to whether a plan would favor or disfavor the Republican Party.[33] David Ellis testified for the defendants that the initial plan submitted to the Select Committee on Redistricting was a plan for one hundred single-member districts.[34]

The fact that a plan with a lower deviation could be drawn does not require that the current plan be invalidated. This issue has been previously addressed by

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29. *Id.*, at 536.
30. Transcript of Proceedings, Feb. 26, 1992, at pp. 61-68.
31. *Id.*, at p. 67.
32. *Id.*, at p. 68.
33. *Id.*
34. *Id.*, pp. 146, 160-61.

this Court in *Gaffney v. Cummings,*[35] wherein this Court held that a maximum population deviation of 7.83 per cent was not a prima facie violation of the Equal Protection Clause, even if another plan could be conceived with lower deviations among the districts.

The plaintiffs point to the case of *White v. Crowell*[36] in support of their theory that the District Court should have required the defendants to show a legitimate state policy for the population deviations existing in the redistricting plan. In *White,* the court was reviewing amendments to the Tennessee reapportionment plan. The amendments caused higher population deviations in the plan as originally submitted under order of the court. The testimony in *White* was that one amendment was made for the sole purpose of preserving a senators home district[37] and the sole purpose of the other amendment "was to consolidate black and other lower income persons in his [the incumbent senator's] district, to consolidate white middle class persons in another district, and to give the other involved representative the precinct in which he had gone to high school."[38] This testimony is dramatically different than that given in the instant case. It shows the use of impermissible purposes which affected identifiable political groups such as blacks and lower income persons. No such testimony of impermissible purpose was advanced in the case at bar. Absent such a showing, the defendants are under no obligation to support the population variances found in HB4043. The District Court, cognizant of this fact, dismissed the plaintiffs' claim.

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35. Gaffney v. Cummings, 412 U.S. 735, 740-41 (1973).
36. White v. Crowell, 434 F. Supp. 1119 (W.D. Tenn. 1977).
37. *Id.*, at 1121.
38. *Id.*, at 1122.

The plaintiffs rely on *Licht v. Quattrocchi*[39] in support of their argument that the District Court erred in upholding the HB4043. They characterize the case by stating that "the Rhode Island Supreme Court invalidated a state senate redistricting plan which reflected a deviation of 2.5 percent, finding that the Rhode Island legislature had improperly based its redistricting on a preset deviation-standard."[40] Amazingly, the plaintiffs also rely on the case of *Farnum v. Burns,*[41] stating that the District Court held that it was bound by the factual finding, made by Justice Bulman in *Licht*, that the legislature had used a preset deviation or population window. However, the District Court in *Farnum* went on to note that it was

> not bound by Justice Bulman's legal conclusion that the use of a 2.5 percent population window violates the obligation to develop state legislative districts that are as nearly equal in population as possible. The Rhode Island Supreme Court did not specifically affirm Justice Bulman on this point.[42]

Furthermore, the District Court in *Farnum* specifically upheld the use of population windows in formulating a redistricting plan. Therefore, the plaintiffs' allegations that this practice indicates that legislative districts were not constructed as nearly as equal as practicable is not supported by the prevailing authorities. The District Court stated that

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39. Licht v. Quattrocchi, 449 A. 2d 887 (R.I. 1982).
40. Jurisdictional Statement, p.13, n.7.
41. Farnum v. Burns, 561 F. Supp. 83 (D. R.I. 1983).
42. *Id.*, at 89 n. 7.

> [b]ecause the state may use a population window and still comply with its obligation to obtain "substantial" population equality, the Court declines the plaintiffs' invitation to extend *Kirkpatrick* to invalidate the use of population windows in reapportioning state legislatures.[43]

It must be pointed out that, despite the intimation of the plaintiffs, there was no testimony that the defendants "set as its population target and goal a deviation range of five percent above or below the ideal population."[44] The testimony of David Ellis was that

> as a matter of course for various areas throughout the state, we as a staff, drew different permutations. For instance, in Kanawha County, we prepare a one and a one, a six and a five, a seven and three, you know, every combination to spur debate, to give the legislators an idea of the different ways that they could draw districts in their area. . . . We were just merely drawing districts that were within the five percent population variance to add fodder for discussion.[45]

That the staff was directed to draw different plans which were all within a five per cent deviation range is not evidence that the Legislature used a preset deviation range. It seems obvious to note that most persons involved in the redistricting process will be cognizant of the fact that a deviation of below ten per cent has been held to be *prima facie* constitutional. In light of this, it

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43. *Id.*, at 93.
44. Jurisdictional Statement, p.19.
45. Transcript of Proceedings, Feb. 26, 1992, p. 148-49.

would seem appropriate for staff to be directed not to draw any districts which are above this deviation range. There is nothing in the testimony suggesting that a ten per cent goal was established. To the contrary, the evidence suggests that many permutations were developed which varied in the percentage of deviation. However, as indicated above, even if this Court, despite the lack of such a finding in the District Court, finds that the Legislature used a preset deviation range, existing authority has upheld the use of population windows.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' MALAPPORTIONMENT CLAIMS.

Under prior decisions of this Court, it has been established that there is a certain degree of population disparity which may be accepted as tolerable. If a redistricting plan does not exceed an overall range of 10 per cent in the population variations among legislative districts, that variance is insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment, so as to require justification by the State.[46] This Court has earlier stated that it could not "glean an equal protection argument from the single fact that two legislative districts in [a State] differ from one another by as much as 9.9 percent. . . ."[47] The plaintiffs choose to ignore the threshold established by prior decisions of this Court, and, at page 18 of the plaintiffs' Jurisdictional Statement, it is contended that "the appropriate analysis is whether the deviations in question occur in recognizing legitimate factors of state interest which are free from any signs of arbitrariness or discrimination." It is further contended by the plaintiffs that "the burden of proof should shift to the state to

46. Brown v. Thompson, 462 U.S. 835, 842 (1983).
47. White v. Regester, 412 U.S. 755, 764 (1973).

justify the deviations. . . ." But as clearly stated in *Brown*, it is only when deviations exceed 10 per cent that the inquiry focuses upon whether the plan will be approved without a satisfactory explanation grounded upon acceptable state policy. Prior decisions of this Court clearly place upon the plaintiffs the initial burden of showing that the redistricting plan violates the Equal Protection Clause. But an even cursory review of the transcript of the hearing below reveals that the plaintiffs have failed to meet that burden of proof.

The demographer presented by the plaintiffs in the Court below projected certain population trends for West Virginia. But he was unwilling or unable to provide any underlying data to support his testimony. Finally, under cross-examination, when asked about contrary projections made by West Virginia University, he testified that "because of the nature of the projections, they are all speculating and I'm speculating and they are both wild guesses, quite frankly."[48] Notwithstanding the admitted inability of the plaintiffs' "demographer" to objectively demonstrate population trends and the perceived impact of population disparities under the redistricting plan being attacked, he offered his clearly subjective analysis as to the growth or loss of population in various areas of the state. From this platform, unsupported by empirical data, the plaintiffs make the leap to a conclusion that population disparities existing under the redistricting plan will affect election results by protecting incumbent members of the Legislature, and that this was accomplished by intentionally overpopulating districts in those areas which had gained population.[49] It appears that the plaintiffs believe that there is no need to *prove* that population disparities will

48. Transcript of Proceedings, Feb. 26, 1992, at p. 50.
49. *See*, Jurisdictional Statement, p. 17.

have a demonstrable effect on elections. They would contend that to overcome the *prima facie* constitutionality of the redistricting plan, it is sufficient to simply show the existence of such disparities and to complain as to their existence.

The plaintiffs complain that the Court below erroneously dismissed their malapportionment claims by a misplaced reliance on *Davis v. Bandemer*.[50] First, this contention is erroneous because the lower Court clearly grounded its dismissal of these claims on *Cosner v. Dalton*, 522 F. Supp. 350 (E.D.Va. 1981).[51] Second, it is true that the lower Court quoted language from *Davis v. Bandemer* discussing the requirement for a showing of adverse effects. But it should be pointed out that the entire testimony of the plaintiffs' witnesses relating to malapportionment was directed to projecting adverse effects for individual Republican incumbents and the Republican Party in general. It was the plaintiffs who presented their evidence for their malapportionment claims in Bandemer-type terminology which would be more appropriate to addressing political gerrymandering issues. Hence, the lower Court's discussion of excluded groups in the context of *Bandemer* was not only appropriate but was generated by the manner in which the plaintiffs cast their claims and their proffer of evidence.

III. THE DISTRICT COURT PROPERLY UPHELD THE USE OF MULTIMEMBER DISTRICTS IN THE REDISTRICTING PLAN.

Contrary to the plaintiffs' claim, the District Court properly upheld the use of a mix of multimember and

50. *Id*, at pp. 19-20.
51. *Id.*, Appendix A, p. 13a.

single-member districts in formulating a redistricting plan. This Court has previously addressed this issue in the case of *White v. Regester.*[52] The instant case presents no new issues for determination in light of the holding in *White*. In that case this Court held that

> [p]lainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with with single-member districts in other parts of the state.[53]

This Court did, however, recognize the viability of a claim that the use of multimember districts is unconstitutional when such districts are being used "invidiously to cancel out or minimize the voting strength of racial groups." However, notwithstanding the fact that the use of multimember districts may, in some instances, give rise to a constitutional violation, the plaintiffs bear the burden of proving invidious discrimination in their use. This Court stated that

> [t]o sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.[54]

52. White v. Regester, 412 U.S. 755 (1973).
53. *Id.*, 412 U.S. at 765.
54. *Id.*, 412 U.S. at 766.

This Court, in the case of *Mobile v. Bolden*,[55] set forth the standard of proof required to prove a violation of the Equal Protection Clause by use of multimember districts. This Court stated that

> [d]espite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. A plaintiff must prove that the disputed plan was "conceived or operated as (a) purposeful devic(e) to further racial. . . discrimination".[56]

The plaintiffs allege "that it was the arbitrary use of multimember districts, animated by regional and partisan bias, that tainted these districts."[57] The plaintiffs appear to be under the misapprehension that the District Court did not analyze the use of multimember districts. However, the District Court noted in footnote eight of its opinion that historical precedent existed for the use of mixed multimember and single-member districts.[58] The District Court noted this historical precedent despite the fact that it was incumbent upon the plaintiffs to

55. Mobile v. Bolden, 446 U.S. 55 (1979).
56. *Id.*, at p. 66.
57. Jurisdictional Statement, p. 21.
58. *Id*, Appendix A, p. 15a.

overcome the *prima facie* case of constitutionality by showing purposeful discrimination. The record from the District Court is bare of any proof that the political processes leading to nomination and election were not equally open to the minority party. Although there was testimony that the redistricting plan may make it more difficult for some members of the minority party to be elected in their new district, there was also testimony that the redistricting plan made it more difficult for some members of the majority party to be reelected.[59] The District Court's dismissal of the plaintiffs' claim of the unconstitutional use of multimember districts is supported by the law and the facts. The plaintiffs' claim with regard to the use of multimember districts embodied in this appeal raises no new issues of law.

IV. THE DISTRICT COURT APPLIED THE CORRECT STANDARD IN DISMISSING THE DEFENDANTS' POLITICAL GERRYMANDERING CLAIM.

This Court set forth the standard by which political gerrymandering claims will be analyzed under the Equal Protection Clause of the United States Constitution in the case of *Davis v. Bandemer.*[60] The first matter of proof is whether there was discriminatory intent. The next inquiry is whether there exists sufficient discriminatory effects to constitute an equal protection violation. If both discriminatory intent and effects are shown, then the burden shifts to the state to show a legitimate state interest which is served by the districting plan.[61] In the instant case, the plaintiffs failed to prove either

59. Transcript of Proceedings, Feb. 26, 1992, at pp. 172, 179.
60. Davis v. Bandemer, 478 U.S. 109 (1986).
61. *Id.*

discriminatory intent or effects which would then shift the burden to the defendants.

Although this court has stated that

> [a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.[62]

Nevertheless, this Court has also noted that although discriminatory intent may not be difficult to prove in this context, that does not, of course, mean that it need not be proved at all to succeed on such a claim.[63]

A review of the record in the District Court reveals no proof of discriminatory intent on the part of the defendants in constructing or enacting a redistricting plan. The testimony indicates that the leadership of the House promoted the construction of single-member districts and smaller multimember districts and invited all members, from both political parties, to draw their own plans for the configuration of their home districts.[64] The failure of the plaintiffs to show that the defendants had any discriminatory intent with regard to the redistricting plan would be sufficient grounds to dismiss the partisan gerrymandering claim. Furthermore, the plaintiffs failed to show any discriminatory effect from the proposed redistricting plan. In fact, there was testimony from the Speaker of the House of Delegates which indicates that he, as a member of the majority

62. *Id.*, at 129.
63. *Id.*, n. 11.
64. *See*, Transcript of Proceedings, Feb. 26, 1992, at pp. 72, 108, 146, 161-62.

party, was just as adversely affected by the redistricting plan as the minority members from his district.[65]

The plaintiffs rely upon *Farnum v. Burns*[66] to suggest that while a population deviation of less than ten per cent is not prima facie unconstitutional, a successful challenge is not precluded. However, in *Farnum*, although the District Court invalidated certain urban districts based upon provisions of the Rhode Island Constitution, it upheld the remainder of the redistricting plan under federal constitutional standards. The Court reiterated that

> [i]n developing state legislative districts. . . the state is not obligated to attempt to achieve absolute population equality. Rather, it may seek to ensure "some voice to political subdivisions, as political subdivisions," while at the same time ensuring that there exists "substantial equality of population among districts."[67]

The plaintiffs argue that the recent opinion rendered in the case of *Republican Party of North Carolina v. Martin*[68] indicates that the District Court in the instant case erred in its analysis of the partisan gerrymandering claim raised by the plaintiffs. However, a reading of that case does not reveal any inconsistency between the rationale for the decision in *Martin* and the decision rendered by the District Court in the instant case.

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65. *Id.*, at pp. 179.
66. *Farnum, supra.*
67. *Id.*, at 93.
68. Republican Party of North Carolina v. Martin, No. 91-1741 (4th Cir. Nov. 24, 1992) (WESTLAW 340828).

Republican Party of North Carolina dealt with the election of superior court judges in that state. Superior court judges were required to run from a particular division but were elected by a statewide vote. The defendants concede that the Fourth Circuit stated that it

> read the phrase "the political process as a whole". . . to speak to the alleged unconstitutional effects of the challenged electoral scheme on the relevant political sphere. . . [citations omitted] [69]

However, the Fourth Circuit also stated that its

> conclusion that RPNC has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent on the egregious nature of the alleged systematic discrimination. [citations omitted]. The confluence of the alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina and the certainty of a similar future, compels our holding. Indeed, we believe that if RPNC had alleged even a modicum of electoral success or access to the political process, its claim might not have withstood a challenge under Rule 12(b)(6).[70]

Clearly, the Fourth Circuit's holding that the RPNC had alleged sufficient facts of discriminatory effects to

69. *Id.*, at p. 20, n. 24.
70. *Id.*, at p. 24.

sustain a 12(b)(6) motion is completely driven by the peculiar and dramatic facts alleged in that case. The Court noted that in the complaint it was alleged that in many districts the majority of persons voting for Superior Court Judge voted for Republican candidates, yet no Republican candidates were elected.[71] In the instant case, testimony was elicited from witnesses for both the plaintiffs and defendants which indicates that in many areas throughout the State of West Virginia, the Democrat Party holds an overwhelming majority in terms of voter registration. There is no indication, either historically or for the future, that the Republican party can garner a majority of the vote in these areas necessary to win seats in the Legislature.

V. THE DISTRICT COURT PROPERLY DISMISSED THE PLAINTIFFS' CLAIM UNDER THE GUARANTY CLAUSE

The plaintiffs raise no new issue with regard to their claim under the Guaranty Clause, Article IV, section 4 of the United States Constitution. The plaintiffs' reliance on *Baker v. Carr*[72] to support the proposition that a claim may be brought under the Clause in cases where there are allegations of violations of both the Guaranty Clause and another independent violation of the United States Constitution is not well founded. The situation in *Baker* was one wherein it was

> argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that

71. *Id.*, at p. 7.
72. Baker v. Carr, 369 U.S. 186 (1962).

> clause have been held to present political questions which are nonjusticiable.[73]

Of course, this Court held in *Baker* that allegations of a violation of the Equal Protection Clause presented a justiciable constitutional cause of action, and rejected the argument that all apportionment cases involve only questions under the Guaranty Clause. In fact, this Court stated that the *Baker* case did,

> in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender.[74]

The plaintiffs in the instant case also place a misguided reliance on this Court's discussion of Guaranty Clause claims in the case of *Reynolds v. Sims*.[75] In discussing Guaranty Clause claims in general, the Court reiterated its position that some questions raised under the Guaranty Clause are nonjusticiable because they raise political questions and there is a clear absence of judicially manageable standards. However, the Court's note indicates that in all instances malapportionment cases will be considered nonjusticiable under the Guaranty Clause.[76]

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73. *Id.*, at 209.
74. *Id.*, at 226-227.
75. *Reynolds, supra.*
76. *Id.*, at 582, n. 64.

The clear absence of judicially manageable standards for determination becomes apparent when the plaintiffs' claim is broken down into its component parts. They argue that "[w]hen a legislature becomes immutable to changing voting patterns -- and therefore no longer republican (in the most fundamental sense) -- that legislature has become structurally defective, while concurrently diluting the rights of individuals and the candidates they support."[77] This argument suggests that there is some sliding scale by which the "republicaness" of state government can be judged. What degree of responsiveness to voting pattern changes is required? Must a legislature look forward ten years when redistricting to ensure its responsiveness to changing voting patterns? If a legislature fails to do so, is that legislature depriving its citizens of a republican form of government? If a legislature takes into consideration other legitimate concerns in formulating a redistricting plan and changing voting patterns are of a lower priority in the formulation of the plan, has that legislature denied its citizens a republican form of government? Clearly, the courts cannot, in the area of redistricting, set forth standards by which a legislature can judge its redistricting plan and determine whether it affords enough "republicaness" to fulfill the requirements of the Guaranty Clause. The District Court properly analyzed the plaintiffs' claim under the Guaranty Clause and dismissed the claim under the proper authorities.

VI. THE PLAINTIFFS HAVE FAILED TO IDENTIFY A JUDICIALLY MANAGEABLE STANDARD BY WHICH THE COURT MAY FIND THAT THE REDISTRICTING PLAN IS UNCONSTITUTIONAL.

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77. *See*, Jurisdictional Statement, p. 28.

A prediction made by Justice O'Connor in her dissenting opinion in *Bandemer* has proved to be prescient. In opposing the plurality opinion in *Bandemer*, Justice O'Connor stated that even if there were some way of limiting political gerrymandering claims to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court. Apportionment is so important to legislators and political parties that the burden of proof the *Bandemer* plurality placed on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints.[78] Before the Court is a redistricting plan which clearly falls within the parameters previously established by this Court, so as to be *prima facie* constitutional. It is uncontested that the minority party, particularly its leadership, fully participated in redistricting at every step in the legislative process. The evidence is uncontroverted that legislative staff and the members of the Legislature were denied access to available computer technology which would have allowed population and geographic data to be overlaid with voter registration and other political data which would have lent itself to partisan gerrymandering. There is no competent evidence that the leadership of the majority party had any design in redistricting other than to increase the number of single-member districts and decrease the size of multimember districts throughout the State. Although there likely was self-interest on the part of some individual members of the Legislature, from both political parties, to influence the size and configuration of their own particular districts, any allegation of a systematic intentional scheme to malapportion the Legislature and debase the votes of any group in a manner which would reduce the numbers of

78. *Bandemer, supra,* at 147.

Republican legislators on a statewide basis, let alone degrade the influence of minority party voters on the political process as a whole, is unsupported.

Republican Delegate Charlotte Lane testified that her particular problem was that her county (Kanawha) has a two-to-one registration of Democrats to Republicans. Despite this, in parts of the county, she said, "the citizens are willing to vote for Republicans, even though they're registered Democratic."[79] Her complaint was not that her new district was largely democratic, but that it included Cabin Creek Magisterial District, where Democrats traditionally voted for Democrats.

In dissent in *Bandemer* Justice O'Connor observed that because a statewide majority of a party's candidates will frequently result only if the "winning" party attracts independent voters and voters from the other party, under the plurality's approach a great deal will turn on whether the support of these voters is included as part of the party's voting strength.[80] The plaintiffs invite this Court to find that the Democrat majority gerrymandered Kanawha County by diluting the value of *Democrat* votes which might occasionally be cast for Republican candidates.

Plaintiffs' witness, Delegate Evelyn Richards, testified on cross-examination that the redistricting of Cabell County had made it more difficult for her as a Republican to be elected.[81] Chief among her complaints was the fact that she was required to run in the same three-member district as the Speaker of the House.

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79. Transcript of the Proceedings, Feb. 26, 1992, p. 79.
80. *Id.*, p. 160.
81. *Id.*, p. 101.

(Under the prior districting plan, Delegate Richards ran in the same six-member district as the Speaker.)[82]

The gist of Republican Delegate Greg Martin's testimony was similar to that of Delegate Lane, described above. He stated that although a proposed single-member district plan which he favored would have placed him in a district which was "probably" two-to-one Democrat, it was a winnable district.[83] When this proposed district was combined with a predominantly Democrat area of Brooke County to form a two-member district, it made it more difficult for him as a Republican to be elected.[84] Again, the alleged problem was apparently the dilution of the votes of Democrats who might vote for a Republican.

Delegate David McKinley, testifying for the plaintiffs, stated that the redistricting plan "had a very chilling effect on finding candidates to run for office throughout the State." And while the plaintiffs decry the use of multimember districts in this action, McKinley testified that the initial motion to combine proposed single-member districts in the northern panhandle into multimember districts was made by him.

The plaintiffs are not simply advocating a group right to an equal share of political power. They seek, but do not identify, some judicially manageable standards which will not only maximize the strength of Republican voters, but which will also prevent any dilution of Democrat votes which might be cast for Republican candidates. In short, they do not actually complain that

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82. In the general election held in November, 1992, Delegate Richards was re-elected to her fourth term in the House.

83. *Id.*, p. 111.

84. *Id.*, pp. 111-112.

the Democrat-dominated Legislature has run afoul of the law enunciated by *Bandemer*. They would expand *Bandemer* towards a requirement of proportional representation which guarantees the Republican Party representation which is not simply consonant with the optimum influence of Republican voters, but which also would enhance the political impact of Democrat voters who might vote Republican, thus including them as a part of the Republican Party's strength. The plaintiffs seek to compel the majority party to gerrymander the State to the advantage of the minority party.

Conclusion

For the reasons stated, the Appellees respectfully request that the Court sustain their motion to dismiss or, in the alternative, Appellees respectfully submit that for the reasons set forth in argument, previous decisions of this Court are clearly dispositive of the questions presented by this appeal, and that the final judgment and order of the District Court should be affirmed without further review by this Court.

Respectfully submitted,

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February 9, 1993

APPENDIX

APPENDIX A

GENERAL ELECTION RETURNS, 1992

HOUSE OF DELEGATES

First Delegate District
(Two to be Elected)

Sam Love (D) Weirton*

Brooke County	709
Hancock County	8,872
Total	9,581

Tamara Herron Pettit (D) New Cumberland*

Brooke County	585
Hancock County	7,938
Total	8,523

Jeff Woofter (R) New Cumberland

Brooke County	330
Hancock County	6,313
Total	6,643

Second Delegate District
(Two to be Elected)

Paul R. Higgins (D) Follansbee*

Brooke County	6,791
Ohio County	1,918
Total	8,709

Robert G. Lindsey, Jr. (D) Wellsburg*

Brooke County	6,520
Ohio County	2,308
Total	8,828

Martin "Marty" Cliser (R) Wheeling

Brooke County	1,777
Ohio County	2,680
Total	4,457

Third Delegate District
(Two to be Elected)

Nancy Lipphardt (D) Wheeling

Ohio County	6,359

Tal Hutchins (D) Wheeling

Ohio County	6,368

David B. McKinley (R) Wheeling*

Ohio County	7,532

L. Gil White (R) Wheeling*

Ohio County	7,834

Fourth Delegate District
(Two to be Elected)

Alfred E. Gene Tribett (D) McMechen*

Marshall County	8,125
Ohio County	100
Total	8,225

Scott G. Varner (D) Moundsville*

Marshall County	7,819
Ohio County	79
Total	7,898

James R. (Jim) Glendenning (R) Benwood

Marshall County	4,678
Ohio County	20
Total	4,698

Trish G. Weinschenker (R) Moundsville

Marshall County	4,691
Ohio County	18
Total	4,709

Fifth Delegate District
(One to be Elected)

Dave Pethtel (D) Hundred*

Wetzel County	4,664

Phillip W. Wiley (R) New Martinsville

Wetzel County	2,218

Sixth Delegate District
(One to be Elected)

C. "Dick" Montgomery (D) West Union

Doddridge County	1,541
Tyler County	1,228
Wetzel	175
Total	2,944

James E. Willison (R) Sistersville*

Doddridge County	1,150
Tyler County	2,790
Wetzel	196
Total	4,136

Seventh Delegate District
(One to be Elected)

James R. (Jim) Brown (D) Harrisville

Gilmer County	205
Pleasants County	948
Ritchie County	1,406
Total	2,559

Otis A. Leggett (R) St. Marys*

Gilmer County	147
Pleasants County	2,332
Ritchie County	2,718
Total	5,197

Eighth Delegate District
(One to be Elected)

Stephen C. Bird (D) Parkersburg

Wood County	2,728

E. W. "Bill" Anderson (R) Williamstown*

Wood County	4,461

Ninth Delegate District
(One to be Elected)

Michael S. Sams (D) Elizabeth

Wirt County	1,545
Wood County	1,820
Total	3,365

Larry Border (R) Davisville*

Wirt County	744
Wood County	2,929
Total	3,673

Tenth Delegate District
(Three to be Elected)

Brenda K. Brum (D) Parkersburg*

Wood County	11,790

George E. Farley (D) Parkersburg

Wood County	10,134

J.D. Beane (D) Vienna*

Wood County	10,163

Robert W. "Bob" Burk, Jr. (R) Parkersburg*
Wood County 11,208

Darren Tallman (R) Parkersburg
Wood County 6,181

John R. Coe (R) Parkersburg
Wood County 6,674

Eleventh Delegate District
(One to be Elected)

M. Susan Beard (D) Amma
Jackson County 391
Roane County 2,302
Total 2,693

Bob Ashley (R) Spencer*
Jackson County 688
Roane County 3,293
Total 3,981

Twelfth Delegate District
(One to be Elected)

Larry LaCorte, Jr. (D) Ravenswood
Jackson County 3,596

Karen Facemyer (R) Ripley*
Jackson County 4,069

Thirteenth Delegate District
(Two to be Elected)

Brady R. Paxton (D) Poca*

Jackson County	868
Mason County	2,387
Putnam County	3,912
Total	7,167

Patricia H. "Pat" White (D) Poca*

Jackson County	978
Mason County	2,641
Putnam County	3,260
Total	6,879

Timothy Bumgardner (R) Liberty

Jackson County	722
Mason County	1,814
Putnam County	3,183
Total	5,719

Chuck Wolfe (R) Winfield

Jackson County	701
Mason County	1,808
Putnam County	3,008
Total	5,517

Fourteenth Delegate District
(Two to be Elected)

Debbie Phillips (D) Scott Depot*

Mason County	3,188
Putnam County	3,937
Total	7,125

Ben Vest (D) Scott Depot*

Mason County	3,097
Putnam County	4,053
Total	7,150

Harriet Lenhart (R) Scott Depot

Mason County	1,925
Putnam County	3,912
Total	5,837

Steve Miller (R) Hurricane

Mason County	2,056
Putnam County	3,841
Total	5,897

Fifteenth Delegate District
(Three to be Elected)

Robert "Chuck" Chambers (D) Huntington*

Cabell County	8,642
Lincoln County	748
Total	9,390

Hercil Gartin (D) Huntington

Cabell County	6,680
Lincoln County	721
Total	7,401

Margarette R. Leach (D) Huntington*

Cabell County	7,385
Lincoln County	760
Total	8,145

Bill Koerner (R) Huntington

Cabell County	4,208
Lincoln County	402
Total	4,610

Nicholas S. Malone (R) Huntington

Cabell County	3,459
Lincoln County	401
Total	3,860

Evelyn E. Richards (R) Huntington*

Cabell County	7,165
Lincoln County	531
Total	7,696

Sixteenth Delegate District
(Three to be Elected)

Rick Houvouras (D) Huntington*

Cabell County	8,734
Wayne County	856
Total	9,590

John C. Huntwork (D) Huntington*

Cabell County	8,157
Lincoln County	980
Total	9,137

Steve Williams (D) Huntington*

Cabell County	9,080
Lincoln County	992
Total	10,072

Mark S. Donahue (R) Huntington

Cabell County	3,972
Lincoln County	408
Total	4,380

Beth Emily Hayes (R) Huntington

Cabell County	4,998
Lincoln County	548
Total	5,546

Jody G. Smirl (R) Huntington

Cabell County	7,567
Lincoln County	711
Total	8,278

Seventeenth Delegate District
(One to be Elected)

Kenneth R. Adkins (D) Huntington

Wayne	4,775

Eighteenth Delegate District
(One to be Elected)

Larry Heck (D) Huntington*

Wayne	4,337

W. Shelton Meade (R) Prichard

Wayne	1,979

Nineteenth Delegate District
(Two to be Elected)

Grant Preece (D) Ragland*

Logan County	365
Mingo County	8,316
Total	8,681

Harry Keith White (D) Gilbert*

Logan County	352
Mingo County	8,039
Total	8,391

Twentieth Delegate District
(Four to be Elected)
(Not more than three may be elected who reside in one county)

Tracy Dempsey (D) Harts*	
Boone County	1,523
Lincoln County	4,440
Logan County	9,289
Total	15,252

Danny Ellis (D) Chapmanville*	
Boone County	1,480
Lincoln County	3,591
Logan County	9,716
Total	14,787

Larry Hendricks (D) Chapmanville*	
Boone County	1,558
Lincoln County	3,612
Logan County	10,071
Total	15,241

David E. Whitman (D) Chapmanville*	
Boone County	1,518
Lincoln County	3,566
Logan County	9,803
Total	14,887

Janice Diamond Stone (R) Stirrat	
Boone County	542
Lincoln County	1,383
Logan County	3,427
Total	5,352

Noel R. Napier (I) Stollings

Boone County	136
Lincoln County	37
Logan County	975
Total	1,148

Twenty-first Delegate District
(One to be Elected)

Delores W. Cook (D) Ridgeview*

Boone County	5,182

Robert L. Turner (R) Bob White

Boone County	1,166

Twenty-second Delegate District
(Two to be Elected)

Ebb Whitley (D) Iaeger*

McDowell County	6,416

Ernest C. Moore (D) Thorpe*

McDowell County	6,681

Twenty-third Delegate District
(Two to be Elected)

Richard Browning (D) Oceana*

Mercer County	1,465
Wyoming County	7,072
Total	8,537

W. Richard "Rick" Staton (D) Mullens*

Mercer County	1,493
Wyoming County	6,957
Total	8,450

Twenty-fourth Delegate District
(One to be Elected)

William G. "Bill" Carper (D) Bluefield*
Mercer County 4,996

Twenty-fifth Delegate District
(Two to be Elected)

Richard D. Flanigan (D) Princeton*
Mercer County 6,765

Odell H. Huffman (D) Princeton*
Mercer County 6,685

Paul H. Davis (R) Princeton
Mercer County 4,211

W.A. "Bill" Trent (R) Lerona
Mercer County 3,481

Twenty-sixth Delegate District
(One to be Elected)

Mary Pearl Compton (D) Union*
Monroe County 3,610
Summers County 980
Total 4,590

Twenty-seventh Delegate District
(Five to be Elected)
(No more than four may be elected who reside in one county)

Robert S. Kiss (D) Prosperity*
Raleigh County 14,940
Summers County 1,995
Total 16,935

Warren R. McGraw, II (D) Beckley*	
Raleigh County	11,825
Summers County	1,521
Total	13,346

Robert P. Pulliam (D) Beckley*	
Raleigh County	14,083
Summers County	1,759
Total	15,842

Pat Reed (D) Beckley*	
Raleigh County	16,748
Summers County	1,964
Total	18,712

Arnold W. Ryan (D) Hinton*	
Raleigh County	13,193
Summers County	2,267
Total	15,460

Gary Wayne Jarrell (R) Rock Creek	
Raleigh County	6,733
Summers County	765
Total	7,498

Filbert (Fil) Pishner (R) Beaver	
Raleigh County	6,132
Summers County	696
Total	6,828

Margaret A. Scott (R) Beaver	
Raleigh County	11,021
Summers County	984
Total	12,005

Twenty-eighth Delegate District
(Two to be Elected)

James "Jim" Gerl (D) Lewisburg
Greenbrier County 5,290

James J. "Jim" Rowe (D) Lewisburg*
Greenbrier County 6,567

Bill Wallace (R) Clintonville*
Greenbrier County 6,625

Twenty-ninth Delegate District
(Three to be Elected)

Tom Louisos (D) Oak Hill*

Fayette County	11,019
Greenbrier County	54
Kanawha County	198
Nicholas County	131
Raleigh County	114
Total	11,516

Bruce N. Petersen (D) Fayetteville*

Fayette County	10,397
Greenbrier County	61
Kanawha County	206
Nicholas County	153
Raleigh County	123
Total	10,940

John Pino (D) Oak Hill*

Fayette County	10,454
Greenbrier County	60
Kanawha County	215
Nicholas County	145
Raleigh County	123
Total	10,997

Jim Spade (R) Hico

Fayette County	4,612
Greenbrier County	21
Kanawha County	31
Nicholas County	63
Raleigh County	39
Total	4,766

Thirtieth Delegate District
(Seven to be Elected)

Bonnie Brown (D) South Charleston*
Kanawha County 23,857

Joe F. Smith (D) Charleston*
Kanawha County 20,958

Joe Farris (D) Charleston*
Kanawha County 20,234

Nancy Kessel (D) Charleston*
Kanawha County 21,455

Phyllis J. Rutledge (D) Charleston*
Kanawha County 25,928

Rudy Seacrist (D) Charleston
Kanawha County 20,006

Sharon Spencer (D) Charleston*
Kanawha County 20,794

Ann Calvert (R) Charleston
Kanawha County 17,295

John B. Wilcox (R) South Charleston
Kanawha County 12,195

Margaret D. "Peggy" Miller (R) South Charleston*
Kanawha County 20,566

Mark C. Pettry (R) Charleston
Kanawha County 9,924

Paul C. Burdette (R) Charleston
Kanawha County 11,194

Ruth Goldsmith (R) South Charleston
Kanawha County 16,409

Tom Crouser (R) Charleston
Kanawha County 11,055

Thirty-first Delegate District
(One to be Elected)

Nelson A. Sorah (D) Charleston*
Kanawha County 2,677

Polly Diller (R) Charleston
Kanawha County 2,493

Thirty-second Delegate District
(Four to be Elected)

Dayton Beard (D) Cross Lanes
Kanawha County 8,230

Jim Boggs (D) Cross Lanes
Kanawha County 8,588

Lucille "Lue" Chandler (D) Clendenin
Kanawha County 8,130

Tony Shepherd (D) Sissonville
Kanawha County 9,518

Dick Henderson (R) St. Albans*
Kanawha County 11,259

Ron Walters (R) Charleston*
Kanawha County 10,065

Steve Harrison (R) Charleston*
Kanawha County 12,714

Wm. Jay Nesbitt (R) Cross Lanes*
Kanawha County 11,156

Thirty-third Delegate District
(One to be Elected)

Randy Schoonover (D) Clay*
Calhoun County 1,755
Clay County 2,186
Gilmer County 210
Total 4,151

Miriam Hopkins (R) Clay
Calhoun County 1,032
Clay County 1,281
Gilmer County 164
Total 2,477

Thirty-fourth Delegate District
(One to be Elected)

John Campbell (D) Sutton*
Braxton County 3,536
Gilmer County 939
Total 4,475

Mark Robinson (R) Glenville

Braxton County	1,742
Gilmer County	1,097
Total	2,839

Thirty-fifth Delegate District
(One to be Elected)

C. Farrell Johnson (D) Summersville*

Nicholas	3,948

James Edward Rucker (R) Summersville

Nicholas	2,142

Thirty-sixth Delegate District
(One to be Elected)

Joe Talbott (D) Webster Springs*

Nicholas County	1,465
Webster County	2,129
Total	3,594

E. Estil Hughes, Jr. (R) Camdem-on-Gauley

Nicholas County	1,097
Webster County	1,273
Total	2,370

Thirty-seventh Delegate District
(Two to be Elected)

J. E. Joe Martin (D) Elkins*

Pocahontas County	2,524
Randolph County	7,487
Total	10,011

Bill Proudfoot (D) Elkins*

Pocahontas County	2,563
Randolph County	7,096
Total	9,659

Thirty-eighth Delegate District
(One to be Elected)

James R. Fealey (D) Weston*

Lewis County	3,249
Upshur County	120
Total	3,369

Larry Paul Haddix (R) Weston

Lewis County	3,117
Upshur County	131
Total	3,248

Thirty-ninth Delegate District
(One to be Elected)

Dale Riggs (R) Buckhannon*

Upshur County	5,567

Fortieth Delegate District
(One to be Elected)

Richard "Rick" Everson (D) Philippi*

Barbour County	3,502
Upshur County	362
Total	3,864

Rosemary Wagner (R) Philippi

Barbour County	3,079
Upshur County	492
Total	3,571

Forty-first Delegate District
(Four to be Elected)

Percy C. Ashcraft (D) Clarksburg*
Harrison County 18,744

Ron Fragale (D) Nutter Fort*
Harrison County 18,881

Larry A. Linch (D) Clarksburg*
Harrison County 15,913

Barbara "Bobbie" Warner (D) Bridgeport*
Harrison County 17,722

Brad Gain (R) Lost Creek
Harrison county 13,514

K. Clark "Kim" Wheeler (R) Shinnston
Harrison County 7,688

Luke Sharp (R) Nutter Fort
Harrison County 6,688

Philip D. Alderman (R) Salem
Harrison County 5,516

Forty-second Delegate District
(One to be Elected)

John F. "Jack" Bennett (D) Grafton*

Marion County	214
Monongalia County	293
Taylor County	3,551
Total	4,058

S. E. (Ed) Moats (R) Grafton
Marion County 149
Monongalia County 192
Taylor County 2,333
Total 2,674

Forty-third Delegate District
(Three to be Elected)

Michael A. Heston (D) Fairmont*
Marion County 14,502

Roman W. Prezioso, Jr. (D) Fairmont*
Marion County 14,379

William E. "Bill" Stewart (D) Fairmont*
Marion County 13,156

Shari L. Drennen (R) Fairmont
Marion County 5,074

David Kennedy (R) Fairmont
Marion County 5,216

Paul E. Prunty (R) Fairmont
Marion County 11,407

Forty-fourth Delegate District
(Four to be Elected)

Robert C. Beach (D) Core*
Monongalia County 15,933

Brian A. Gallagher (D) Morgantown*
Monongalia County 18,152

Michael A. Oliverio, II (D) Morgantown*
Monongalia County 18,961

Stephen L. Cook (D) Morgantown*
Monongalia County 15,280

Jenny L. Dinsmore (R) Morgantown
Monongalia County 13,013

Forty-fifth Delegate District
(One to be Elected)

David E. Miller (D) Kingwood*
Preston County 5,015

Forty-sixth Delegate District
(One to be Elected)

David "O.B." Collins (D) Davis*
Preston County 1,400
Tucker County 2,041
Total 3,441

Richard "Dick" Schwartz (R) Davis
Preston County 1,610
Tucker County 1,391
Total 3,001

Forty-seventh Delegate District
(One to be Elected)

Harold Michael (D) Old Fields*
Hardy County 3,416
Pendleton County 2,300
Total 5,716

Forty-eighth Delegate District
(One to be Elected)

Allen V. Evans (R) Dorcas*

Grant County	3,357
Mineral County	2,037
Pendleton County	83
Total	5,477

Forty-ninth Delegate District
(One to be Elected)

James T. Nichol (D) Keyser*

Mineral County	4,494

Fiftieth Delegate District
(One to be Elected)

Jerry L Mezzatesta (D) Romney*

Hampshire County	4,361
Mineral County	666
Total	5,027

Fifty-first Delegate District
(One to be Elected)

John A. Roberts (D) Hedgesville

Berkeley County	1,098
Morgan County	1,329
Total	2,427

Charles S. Trump, IV (R) Berkely Springs*

Berkeley County	670
Morgan County	3,597
Total	4,267

Fifty-second Delegate District
(One to be Elected)

Vicki V. Douglas (D) Martinsburg*

Berkeley County	3,538

David A. Avella (R) Martinsburg
Berkeley County 2,911

Fifty-third Delegate District
(One to be Elected)

Larry Victor Faircloth (R) Inwood*
Berkeley County 4,565

Fifty-fourth Delegate District
(One to be Elected)

Kay Stout (D) Martinsburg
Berkeley County 2,517

John Overington (R) Martinsburg*
Berkeley County 2,993

Fifty-fifth Delegate District
(One to be Elected)

John Doyle (D) Shepherdstown*
Jefferson County 3,267

Jean Kingsbury Jacobs (R) Shepherdstown
Jefferson County 2,129

Fifty-sixth Delegate District
(One to be Elected)

Dale Manuel (D) Charles Town*
Jefferson County 3,230

Ron Rissler (R) Charles Town
Jefferson County 2,499

AFFIDAVIT OF SECRETARY OF STATE

State of West Virginia
County of Kanawha, to-wit:

I, Ken Hechler, Secretary of State of the State of West Virginia, hereby certify that the attached election returns for the 1992 General Election for the West Virginia House of Delegates are the true and correct returns certified by the Boards of Canvassers in each county. Candidates who have been elected are indicated by an asterisk.

Given under my hand and the Great Seal of the State of West Virginia, on this 5th day of February, 1993.

(SEAL)

/s/ Ken Hechler
Secretary of State